RECORD AND BRIEFS

FILED
JAN 17 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-254

IN THE

Supreme Court of the United States

WATER SPLASH, INC.,

Petitioner,

v.

TARA MENON,

Respondent.

On Writ of Certiorari to the Fourteenth Court of Appeals, Houston, Texas

JOINT APPENDIX

JEREMY GASTON
Counsel of Record
ANDREW K. MEADE
HAWASH MEADE GASTON NEESE & CICACK LLP
2118 Smith Street
Houston, TX 77002
jgaston@hmgnc.com
(713) 658-9001

Counsel for Petitioner

TIMOTHY A. HOOTMAN
Counsel of Record
2402 Pease Street
Houston, TX 77003
thootman2000@yahoo.com
(713) 247-9548

Counsel for Respondent

PETITION FOR CERTIORARI FILED AUGUST 25, 2016
CERTIORARI GRANTED DECEMBER 2, 2016

TABLE OF CONTENTS

Page

Relevant Docket Entries:

District Court of Galveston County, Texas, No. 13-CV-0205, Relevant Docket Entries .. 1

State of Texas in the Fourteenth Court of Appeals, No. 14-14-00012-CV, Relevant Docket Entries 3

Supreme Court of Texas, No. 15-0901, Relevant Docket Entries 4

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters [as reprinted in 28 USCA Federal Rules of Civil Procedure following Rule 4] 5

Trial Court:

Motion for Substituted Service on Defendant, Tara Menon (CR149) May 13, 2010..... 18

Order Granting Plaintiff's Motion for Substituted Service (CR166) May 17, 2013. 37

Default Judgment - Non Final (Interlocutory) (CR489) September 25, 2013 39

Order of Dismissal - Final - OCA (SuppCR6) December 31, 2013 46

Order Denying Defendant's Motion for New Trial (CR584) January 3, 2014 48

TABLE OF CONTENTS—Continued

Page

Court of Appeals:

Opinion issued REVERSED AND REMANDED June 30, 2015 49

Opinion issued DISSENTING June 30, 2015. 59

Judgment June 30, 2015..... 94

Motion for en banc reconsideration disposed DENIED October 6, 2015..... 95

Supreme Court of Texas:

Petition for Review disposed Denied May 27, 2016..... 97

IN THE DISTRICT COURT OF
GALVESTON COUNTY, TEXAS

No. 13-CV-0205

WATER SPLASH, INC.

vs.

TARA MENON and SOUTH POOL and SPA, INC.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
02/12/13	Original Petition – OCA (CR6)
05/10/13	Motion for Substituted Service on Defendant, Tara Menon (CR149)
05/17/13	Order Granting Plaintiff's Motion for Substituted Service (CR166)
05/21/13	Plaintiff's First Amended Original Petition (CR167)
08/01/13	Motion for Default Judgment Against Tara Menon (CR303)
09/16/13	Plaintiff's First Supplement to Motion for Default Judgment Against Tara Menon (CR331)
09/25/13	Default Judgment - Non Final (Interlocutory) (CR489)
10/21/13	Rule 11 Agreement Regarding Settlement of Case (CR495)

DATE	PROCEEDINGS
10/28/13	Defendant's Motion for New Trial (CR497)
12/16/13	Plaintiff's Response to Defendant Tara Menon's Motion for New Trial (CR558)
12/31/13	Plaintiff's Motion to Dismiss, with Prejudice, as to South Pool and SPA, Inc. and Muhammad Tello, Only (SuppCR4)
12/31/13	Order of Dismissal - Final - OCA (SuppCR6)
01/03/14	Order Denying Defendant's Motion for New Trial (CR584)
01/05/14	Notice of Appeal (CR585)

THE STATE OF TEXAS IN THE
FOURTEENTH COURT OF APPEALS

No. 14-14-00012-CV

TARA MENON,

v.

WATER SPLASH, INC.,

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1/22/2014	Reporters record filed
3/12/2014	Clerks record filed
4/18/2014	Brief filed - oral argument requested
5/13/2014	Supplemental clerks record filed
6/18/2014	Brief filed - oral argument requested
6/30/2015	Opinion issued REVERSED AND REMANDED
6/30/2015	Opinion issued DISSENTING
7/15/2015	Motion for en banc reconsideration filed
7/17/2015	Response requested by the court
7/24/2015	Response filed
10/6/2015	Motion for en banc reconsideration disposed DENIED
7/14/2016	Mandate issued

SUPREME COURT OF TEXAS

Case No. 15-0901

WATER SPLASH INC.,

v.

MENON,

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
11/20/2015	Petition for Review
12/4/2015	Response Waiver filed
1/8/2016	Supreme Court of Texas Requested Response
2/5/2016	Response to Petition
2/22/2016	Reply to Response
5/27/2016	Petition for Review disposed Denied

Convention On The Service Abroad Of Judicial And Extrajudicial Documents In Civil Or Commercial Matters

[as reprinted in 28 USCA Federal Rules of Civil Procedure following Rule 4]

The States signatory to the present Convention,

Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,

Desiring to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.

This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER I—JUDICIAL DOCUMENTS

Article 2

Each contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other contracting States and to proceed in conformity with the provisions of articles 3 to 6.

Each State shall organise the Central Authority in conformity with its own law.

Article 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.

The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

Article 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

Article 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either—

(a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

(b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph (b) of the first paragraph of this article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.

The certificate shall be forwarded directly to the applicant.

Article 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 8

Each contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

Each contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another contracting State which are designated by the latter for this purpose.

Each contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with—

(a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

(b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 11

The present Convention shall not prevent two or more contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding articles and, in particular, direct communication between their respective authorities.

Article 12

The service of judicial documents coming from a contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed.

The applicant shall pay or reimburse the costs occasioned by—

(a) the employment of a judicial officer or of a person competent under the law of the State of destination,

(b) the use of a particular method of service.

Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.

It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that—

(a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

(b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled—

(a) the document was transmitted by one of the methods provided for in this Convention,

(b) a period of time of not less than six months, considered adequate by the judge in the particular

case, has elapsed since the date of the transmission of the document,

(c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled—

(a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

(b) the defendant has disclosed a *prima facie* defense to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.

This article shall not apply to judgments concerning status or capacity of persons.

CHAPTER II—EXTRAJUDICIAL DOCUMENTS

Article 17

Extrajudicial documents emanating from authorities and judicial officers of a contracting State may be transmitted for the purpose of service in another contracting State by the methods and under the provisions of the present Convention.

CHAPTER III—GENERAL CLAUSES

Article 18

Each contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 19

To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

Article 20

The present Convention shall not prevent an agreement between any two or more contracting States to dispense with—

(a) the necessity for duplicate copies of transmitted documents as required by the second paragraph of article 3,

(b) the language requirements of the third paragraph of article 5 and article 7,

(c) the provisions of the fourth paragraph of article 5,

(d) the provisions of the second paragraph of article 12.

Article 21

Each contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following—

(a) the designation of authorities, pursuant to articles 2 and 18,

(b) the designation of the authority competent to complete the certificate pursuant to article 6,

(c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to article 9.

Each contracting State shall similarly inform the Ministry, where appropriate, of—

(a) opposition to the use of methods of transmission pursuant to articles 8 and 10,

(b) declarations pursuant to the second paragraph of article 15 and the third paragraph of article 16,

(c) all modifications of the above designations, oppositions and declarations.

Article 22

Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905 [99 BFSP 990], and on 1st March 1954 [286 UNTS 265], this Convention shall replace as between them articles 1 to 7 of the earlier Conventions.

Article 23

The present Convention shall not affect the application of article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.

These articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

Article 24

Supplementary agreements between parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the Parties have otherwise agreed.

Article 25

Without prejudice to the provisions of articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the contracting States are, or shall become, Parties.

Article 26

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of article 26.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 28

Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 29

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of article 27, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in article 26, and to the States which have acceded in accordance with article 28, of the following—

(a) the signatures and ratifications referred to in article 26;

(b) the date on which the present Convention enters into force in accordance with the first paragraph of article 27;

(c) the accessions referred to in article 28 and the dates on which they take effect;

(d) the extensions referred to in article 29 and the dates on which they take effect;

(e) the designations, oppositions and declarations referred to in article 21;

(f) the denunciations referred to in the third paragraph of article 30.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed the present Convention.

DONE at The Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of The States represented at the Tenth Session of the Hague Conference on Private International Law.

[Signatures omitted.]

IN THE DISTRICT COURT OF
GALVESTON COUNTY, TEXAS
212th JUDICIAL DISTRICT

[Filed 05/13/2010]

No. 13-CV-0205

WATER SPLASH, INC.

vs.

TARA MENON and SOUTH POOL and SPA, INC.

PLAINTIFF'S MOTION FOR SUBSTITUTE SERVICE OF PROCESS ON DEFENDANT, TARA MENON

Plaintiff, Water Splash, Inc., asks the court to authorize substitute service on Defendant, Tara Menon. In support of this Motion, Plaintiff will show the Court as follows:

I. BACKGROUND

Defendant Tara Menon is a non-resident individual who does business in Texas and who conspired with co-defendant South Pool and Spa, Inc. to commit numerous torts in Texas against plaintiff Water Splash, Inc. However, Menon is a Canadian resident and she is not believed to maintain a regular place of business in Texas. Menon does not maintain an agent for service of process in Texas. Defendant is subject to personal jurisdiction in the State of Texas because she satisfies the requirements stated in the Texas Long Arm Statute. However, attempts to serve her have failed.

Article 10(a) of the Hague Convention states, "[p]rovided the State of destination does not object, the present Convention shall not interfere with the freedom to send judicial documents, by postal channels, directly to persons abroad . . . ." Convention done at The Hague art. 10(a), Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163, C.T.S. 1989/2. Canada has not objected to use of certified mail as a proper means of service[1]. Thus, the use of postal channels is a proper means of service under Article 10(a) of the Hague Convention.

Service was attempted by mailing citation with a copy of Plaintiff's Original Petition attached thereto through the Texas Secretary of State, located at 1019 Brazos, Room 220, Austin, Texas 78701. The Texas Secretary of State then attempted service by forwarding the citation with the petition attached to Tara Menon at her address at 916 boul De Sainte-Adele, Bur 113, Saint Adele, QC, J8B 2N2 ("Menon's Address"), by certified mail, return receipt requested. See attached *Exhibit A*.

Menon is a former employee of Plaintiffs and Menon's Address is the same address that Menon provided to Plaintiff for her employment documentation as well as the address for delivery of mail. See *Exhibit B* - Affidavit of Gokhan Celik.

Additionally, on February 13, 2013, after this suit was filed and Ms. Menon found out about the lawsuit, she sent to Mr. Celik an email which acknowledges her awareness of the lawsuit, and also attaches Invoices

---

[1] See United States Department of State: http://travel.state.gov/law/judicial/judicial_682.html. ("In its Declaration and Reservations on the Hague Service Convention, Canada did not object to the methods of service under Article 10, and does permit service via postal channels.").

for her services. See *Exhibit C* - Email from Menon to Celik dates February 13, 2013. A review of the Invoices shows that the address she used at that time is the same as the address where service was previously attempted in this matter.

Plaintiff's attempt to formally serve Menon have not been successful and Plaintiff seeks an order from this Court permitting substituted service on Menon by alternative means which are reasonably effective to give Menon notice of the suit.[2]

II. MOTION FOR SUBSTITUTE SERVICE OF PROCESS

Texas Rule of Civil Procedure 109a allows a court to "prescribe a different method of substituted service, if the court finds, and so recites in its order, that the method so prescribed would be as likely as publication to give defendant actual notice." Accordingly, Plaintiffs request that the Court authorize service in the following manners:

1) Service by first class mail, certified mail, and Federal Express to Menon's address; and

2) Service by email to each of Menon's known email addresses.

Service by first class mail, certified mail (return receipt requested), and Federal Express to the Address noted herein. Menon is known to regularly check and receive mail at the Address, so her receipt of the citation is likely. Service via email to each of the

---

[2] NOTE: There can be no doubt that Menon has already received a copy of the lawsuit and is aware that she is a defendant in the lawsuit. *Exhibit C* (email from Menon to Celik dated February 13, 2013).

following emails that Menon has been known to use over the past 12 months:

Menon2@securenet.net

tmenon@southpoolandspa.net

tdmenon58@gmail.com

Olivia@southpoolandspa.net

Service via email is permitted when an actual address is not known and the party being served has recently used the address on which service is requested.

Menon used the email address of tmenon@southpool andspa.net as recently as February 13, 2013 when she used it to communicate with co-Defendant, South Pool and Spa's Mike Tello. See attached *Exhibit D* - Document Bates Labeled Def. South Pool 0156.

Menon used the email address of menon2@ securenet.net as recently as January 2, 2013 when she used it to communicate with co-Defendant, South Pool and Spa's Mike Tello. See attached *Exhibit E* - Document Bates Labeled Def. South Pool 0157.

Menon used the email address of tdmenon58@gmail .com as recently as May 15, 2012 when she used it to communicate with co-Defendant, South Pool and Spa's Mike Tello. See attached *Exhibit F* - Document Bates Labeled Def. South Pool 0071.

Plaintiff attaches the affidavit of Plaintiff's attorney, Andrew K. Meade, to this motion as *Exhibit G* to verify the attempts at service, and incorporates it by reference.

III. CONCLUSION

Plaintiff has taken all reasonable steps to locate Menon and to personally serve her. Because these

efforts have failed, the Court should grant this motion. This will give Plaintiff the chance to receive the same injunctive relief as previously ordered in this matter and to allow the case to proceed. Plaintiff further asks for all other relief to which it is justly entitled.

Respectfully submitted,

HAWASH MEADE GASTON NEESE & CICACK LLP

/s/Andrew K. Meade

Andrew K. Meade
Texas Bar No. 24032854
Samuel B. Haren
Texas Bar No. 24059899
2118 Smith Street
Houston, Texas 77002
713.658.9001
713.658 9011 (Fax)
ameade@hmgllp.com
sharen@hmgllp.com

Attorneys for Water Splash, Inc.

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document has been served to the following pursuant to the Texas Rules of Civil Procedure on May 10, 2013.

Via Facsimile: (713) 481-9495 and Email
Ms. Jill Yaziji
Yaziji Law Firm
1001 Texas, Suite 1400
Houston, Texas 77002

/s/Andrew K. Meade
Andrew K. Meade

Exhibit A

[SEAL] The State of Texas
Secretary of State

2013-223954-1

I, the undersigned, as Secretary of State of Texas DO HEREBY CERTIFY that according to the records of this office, a copy of the Citation and Plaintiff's Original Petition, Application For Temporary Restraining Order, Request For Temporary And Permanent Injunction And Request For Disclosures in the cause styled:

Water Splash Inc Vs Tara Menon et al
212th Judicial District Court of
Galveston County, Texas
Cause No: 13CV0205

was received by this office on February 15, 2016, and that a copy was forwarded on February 21, 2013, by REGISTERED MAIL, return receipt requested to:

Tara Menon
916 boul De Sainte-Adele, Bur 113
Saint Adele, QC J8B 2N2
Canada

The PROCESS was returned to this office on April 1, 2013, Bearing the notation Non Reclame

[SEAL]

Date issued: April 2, 2013

/s/ John Steen
John Steen
Secretary of State

Exhibit B

IN THE DISTRICT COURT OF
GALVESTON COUNTY, TEXAS
212th JUDICIAL DISTRICT

No. 13-CV-0205

WATER SPLASH, INC.

vs.

TARA MENON and SOUTH POOL and SPA, INC.

AFFIDAVIT OF GOKHAN CELIK

BEFORE ME, the undersigned authority, on this day personally appeared GOKHAN CELIK, who under oath stated as follows:

"My name is Gokhan Celik. I am over eighteen (18) years of age and am legally competent to make this Affidavit, which is true and correct, is based on my personal knowledge, and is made voluntarily and not under duress.

I am the owner of Water Splash, Inc., Plaintiff in the above-styled and numbered lawsuit. The address provided to Water Splash, Inc. by Tara Menon is 916 boul De Sainte-Adele, Bur 113, Saint Adele, QC, J8B 2N2. Menon is a former sales representative for Water Splash, Inc. and this is the same address that Menon provided to me for her employment documentation as well as the address for delivery of mail. Menon is known to regularly check and receive mail at the Address."

Further, affiant sayeth not.

/s/ Gokhan Celik
Gokhan Celik

SWORN AND SUBSCRIBED TO before me on this 9 day of May, 2013.

/s/ T. Rogers
Notary Public

T. ROGERS
Notary Public State of Texas
My Commission expires
November 14, 2016

Exhibit C

Subject: Re: Tyler
From: Gokhan Celik <gcelik@watersplashnet.com>
Date: Tue, May 15, 2012 8:29 am
To: South Pool <mike@southpoolandspa.net>
Cc: tara menon <tdmenon58@gmail.com>

Hi Mike,

As we spoke yesterday, I mentioned faxing the contract. I will re-fax and scan and email you. I just came to my office.

Talk to you soon,
Gokhan

On Tue, May 15, 2012 at 9:17 am, South Pool <mike @southpoolandspa.net> wrote:

Good morning Gokhan. We need to get the contract signed and faxed today please. Also let me know when to expect the deposit. My hands are tied right now, I don't have a contract, I don't have a deposit and I don't have product to install. However, we do have a deadline of 5/30. The club is having a party of 320 kids on june 1st. Please let me know if I need to pull out. I need to make a decision. Y end of day today.

Thank you for your understanding
Mike

–

Water Splash Inc.
(800) 936-3430
www.watersplashnet.com

Subject: Products on Galveston project
From: Tara <tara@southpoolandspa.com>
Date: Wed, Feb 13, 2013 2:36 pm
To: Mike@southpoolandspa.net

Mike,

I don't know where the production is on these but, [redacted] needs to make some changes to the design somewhere so they don't look like Gokhan's. Of course the loop, in grounds, etc are all very similar but, Horse, Cowboy Hat, he has to make changes enough so that you are not dealing with any patent violations. Though, I don't think Gokhan has patented anything quite frankly.

T

Subject Re: Deposit
From: tare <tara@southpoolandspa.com>
Date: Wed, Jan 02, 2013 10:03 pm
To: Mike@southpoolandspa.net

will create an invoice for both Galveston and for Cape Christian. Was the contract ok for you? I think we will be required to deliver some modifications, particularly related to the substructure bases. [redacted] Metal/plastic?

So you want to order parts for Galveston from [redacted]? is that correct?

I am only returning towards the 24th. Long trip and apologize but it was planned a long time ago....all family I haven't seen in ages but, wow India has got to be the craziest place on the planet. Drives you hotel.

t

On 2013-01-03 12:07 AM, Mike@southpoolandspa.net wrote:

Tara:

Hope all is well. When are you coming back? We need to get deposit from Galveston and Florida. [redacted] is almost ready to provide feature for Galveston project

Thanks
Mike

Subject: Deposit
From: Mike@southpoolandspa.net
Date: Wed, Jan 02, 2013 12:37 pm
To: "taramen1" <menon2@securenet.net>,
"Tara" <Tara@southpoolandspa.com>

Tara:

Hope all is well. When are you coming back? We need to get deposit from Galveston and Florida. [redacted] is almost ready to provide feature for Galveston project

Thanks
Mike

Exhibit D

Subject: Products on Galveston project
From: Tara <tara@southpoolandspa.com>
Date: Wed, Feb 13, 2013 2:36 pm
To: Mike@southpoolandspa.net

Mike,

I don't know where the production is on these but, [redacted] needs to make some changes to the design somewhere so they don't look like Gokhan's. Of course the loop, in grounds, etc are all very similar but, Horse, Cowboy Hat, he has to make changes enough so that you are not dealing with any patent violations. Though, I don't think Gokhan has patented anything quite frankly.

T

Exhibit E

Subject Re: Deposit
From: tara <tara@southpoolandspa.com>
Date: Wed, Jan 02, 2013 10:03 pm
To: Mike@southpoolandspa.net

will create an invoice for both Galveston and for Cape Christian. Was the contract ok for you? I think we will be required to deliver some modifications, particularly related to the substructure bases. [redacted] Metal/plastic?

So you want to order parts for Galveston from [redacted]? is that correct?

I am only returning towards the 24th. Long trip and apologize but it was planned a long time ago....all family I haven't seen in ages but, wow India has got to be the craziest place on the planet Drives you hotel.

t

On 2013-01-03 12:07 AM, Mike@southpoolandspa.net wrote:

Tara:

Hope all is well. When are you coming back? We need to get deposit from Galveston and Florida. [redacted] is almost ready to provide feature for Galveston project

Thanks
Mike

Subject: Deposit
From: Mike@southpoolandspa.net
Date: Wed, Jan 02, 2013 12:37 pm
To: "taramen1" <menon2@securenet.net>,
"Tara" <Tara@southpoolandspa.com>

Tara:

Hope all is well. When are you coming back? We need to get deposit from Galveston and Florida. [redacted] is almost ready to provide feature for Galveston project

Thanks
Mike

Exhibit F

Subject: Re: Tyler
From: Gokhan Celik <gcelik@watersplashnet.com>
Date: Tue, May 15, 2012 8:29 am
To: South Pool <mike@southpoolandspa.net>
Cc: tara menon <tdmenon58@gmail.com>

Hi Mike,

As we spoke yesterday, I mentioned faxing the contract. I will re-fax and scan and email you. I just came to my office.

Talk to you soon,
Gokhan

On Tue, May 15, 2012 at 9:17 am, South Pool <mike @southpoolandspa.net> wrote:

Good morning Gokhan. We need to get the contract signed and faxed today please. Also let me know when to expect the deposit. My hands are tied right now, I don't have a contract, I don't have a deposit and I don't have product to install. However, we do have a deadline of 5/30. The club is having a party of 320 kids on june 1st. Please let me know if I need to pull out. I need to make a decision. Y end of day today.

Thank you for your understanding
Mike

--

Water Splash Inc.
(800) 936-3430
www.watersplashnet.com

Exhibit G

IN THE DISTRICT COURT OF
GALVESTON COUNTY, TEXAS
212th JUDICIAL DISTRICT

No. 13-CV-0205

WATER SPLASH, INC.

vs.

TARA MENON and SOUTH POOL and SPA, INC.

AFFIDAVIT OF ANDREW K. MEADE

STATE OF TEXAS)
)
COUNTY OF HARRIS)

Before me, the undersigned notary, on this day personally appeared Andrew K. Meade, a person whose identity is known to me. After I administered an oath to him, upon his oath he said:

1. "My name is Andrew K. Meade. I am 18 years of age, of sound mind, and capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

2. I am an attorney licensed to practice in the State of Texas, with over 11 years of experience representing plaintiffs and defendants in commercial litigation and arbitration.

3. Plaintiff, Water Splash, Inc., retained me to represent it in a suit against South Pool and Spa, Inc. and Tara Menon. Ms. Menon is a Canadian resident

who does not maintain a regular place of business in Texas to the best of my knowledge.

4. Service was initially attempted on Ms. Menon by certified mail, return receipt requested. As evidenced by Exhibit H, this mailing came back unclaimed.

5. Subsequently, Plaintiff's Original Petition and Request for Disclosures was forwarded to the Secretary of State of Texas for service pursuant to the Texas Rules of Civil Procedure. The Secretary of State forwarded a copy of the Petition and Request for Disclosures to Ms. Menon on February 21, 2013. As evidenced on the Certificate from the Secretary of State (Exhibit A), process was returned to their office on April 1, 2013, bearing the notation "Non Reclaim".

7. As evidenced by various emails attached to this Motion, Ms. Menon uses various email accounts and it is my opinion that she will receive notice of this suit (if she has not already) by forwarding to her various email addresses.

FURTHER AFFIANT SAYETH NOT.

Signed under the pains and penalties of perjury this 10th day of May, 2013.

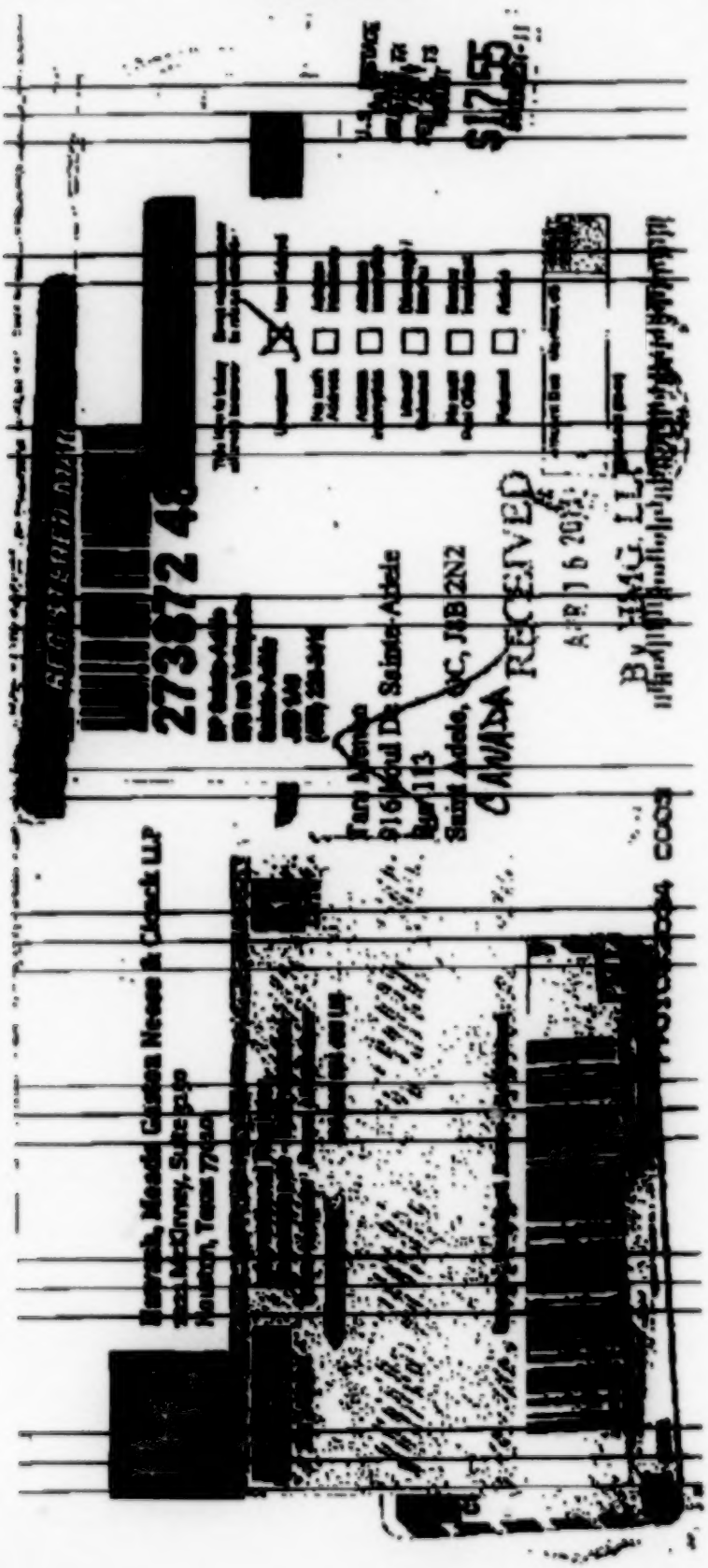
/s/ Andrew K. Meade

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, on this the 10th day of May, 2013, to certify which witness my hand and official seal.

/s/ Nancy K. Jacobs
NOTARY PUBLIC, STATE OF TEXAS

NANCY K. JACOBS
Notary Public, State of Texas
My Commission Expires
February 17, 2014

Exhibit H



IN THE DISTRICT COURT OF
GALVESTON COUNTY, TEXAS
212th JUDICIAL DISTRICT

[Filed: May 17, 2013]

No. 13-CV-0205

WATER SPLASH, INC.

vs.

TARA MENON and SOUTH POOL and SPA, INC.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUBSTITUTE SERVICE OF PROCESS ON DEFENDANT, TARA MENON

On this day the Court came to consider Plaintiffs' Motion for Substituted Service of Process on Defendant, Tara Menon (the "Motion"). The Court finds that Plaintiff has diligently and reasonably attempted to locate Defendant, Tara Menon's address and to effectuate personal service on her and that further efforts to locate and personally serve Menon would likely be futile.

After considering the facts, law, and argument of counsel, the Court has decided to GRANT the Motion. The Court hereby ORDERS that Plaintiff may serve Menon by publication. The Court further finds that the following methods of service are more likely than publication to provide Menon with actual notice of this suit and accordingly permits Plaintiff to use such methods to achieve service:

1) Service by first class mail, certified mail (return receipt requested), and Federal Express to 916 boul De Sainte-Adele, Bur 113, Saint Adele, QC, J8B 2N2.

2) Service via email to Menon's known email addresses:
Menon2@securenet.net;
tmenon@southpoolandspa.net;
tdmenon58@gmail.com;
Olivia@southpoolandspa.net

Signed on this the 17th day of May 2013.

/s/ [Illegible]
Judge Presiding

IN THE DISTRICT COURT OF
GALVENSTON COUNTY, TEXAS
212th JUDICIAL DISTRICT

[Filed: September 25, 2013]

No. 13-CV-0205

WATER SPLASH, INC.

vs.

TARA MENON and SOUTH POOL and SPA, INC.

DEFAULT JUDGMENT AND PERMANENT INJUNCTION AGAINST TARA MENON

On this date, the Court considered Plaintiff, Water Splash, Inc.'s Motion for Default Judgment against Tara Menon. Plaintiff appeared and Defendant, Tara Menon, although duly cited to appear failed to file an answer or otherwise make an appearance in this matter within the time allowed by law. The Court has been presented evidence establishing that Menon has availed herself to jurisdiction in the State of Texas by travelling to and conducting business in the State of Texas, and specifically in Galveston County, Texas. The Court also finds that Defendant was given proper notice of this suit, as well as being provided proper notice of Plaintiff's Motion for Default Judgment and of this hearing. The Court finds the evidence supports that Defendant is not in the military or in active duty.

The Court, having reviewed the evidence submitted, makes the following findings of fact which are deemed admitted by Tara Menon due to her failure to appear in this matter:

1. Water Splash, Inc. filed this lawsuit on February 12, 2013. After that date, Tara Menon contacted an attorney for Defendant South Pool and Spa via email to discuss the lawsuit. Menon is aware of this lawsuit and has been provided notice of this suit in accordance with the Laws of the State of Texas.

2. Tara Menon was an employee of Water Splash, Inc. from 2011 to February 2013.

3. In July 2012, Menon submitted two bids to the City of Galveston to construct splash pads at Wright Cuney Park and Menard Park (the "Bids"). Menon submitted these bids as "Sales Manager" of South Pool & Spa, Inc.

4. The Bids submitted by Menon and South Pool and Spa, Inc. included trade names, design, CAD, and warranty information belonging to Water Splash, Inc. Menon did not have permission from Water Splash to submit the Bids using Water Splash design, CAD or warranty documents.

5. At the time of the Bid submissions, Water Splash possessed an exclusive distributor agreement with Adventure Playground. Adventure Playground also submitted bids for the Wright Cuney Park and Menard Park splash pad projects. Adventure Playground's bids both contained trade names, design, CAD and warranty documents from Water Splash, Inc. Adventure Playground did have consent to use Water Splash's design, CAD and warranty documents in their bids.

6. There were two bids submitted for the Wright Cuney Park splash pad project. The contract

to construct the Wright Cuney Park splash pad project was awarded to South Pool and Spa. Adventure Playground's bids was second. But for South Pool and Spa's bid, Adventure Playground would have won the Wright Cuney Park bid.

7. There were three bids submitted for the Menard Park splash pad project. The contract to construct the Menard Park splash pad project was awarded to South Pool and Spa. Adventure Playground's bids was second. Specialty Construction's bid was third. But for South Pool and Spa's bid, Adventure Playground would have won the Menard Park bid.

8. Menon's conduct, as Sales Manager of South Pool and Spa, was wrongful in that she used, without permission, proprietary information belonging to her employer, Water Splash. Menon violated the confidentiality provision of her employment agreement.

9. Had Adventure Playground been awarded the Bids, Water Splash would have generated income based upon the sale of its products and warranty. Water Splash's income from the Menard Park and Wright Cuney Park projects would have been at least $75,000 and as much as $95,000.

10. After Menon's termination from Water Splash, Inc. in February 2013, Menon has continued to use and disseminate Water Splash's proprietary documents. Based on the evidence presented, Menon has sent proprietary Water Splash documents to AquaTronics, located in Instanbul, Turkey, and she has requested that AquaTronics

modify or revise the plans and specifications in such a way to change the character of the product to not appear to look like Water Splash's proprietary products.

Based upon Menon's failure and refusal to appear in this matter, the Court finds that Menon has admitted the foregoing.

1. On the claims of unfair competition, conversion, tortious interference with prospective business, and conspiracy, the court finds in favor of Plaintiff, Water Splash, Inc. and against Defendant, Tara Menon, and awards Plaintiff the amount of $60,000.00 to be paid by Defendant, Tara Menon.

2. The Court further finds that Menon is guilty of fraud, breach of fiduciary duty, and violation of the Texas Theft Liability Act. The Court finds that the conduct of Menon was intentional and was done with malice. Therefore, Plaintiff is awarded $60,000.00 against Menon as exemplary or punitive damages.

3. Plaintiff is entitled to prejudgment interest on the damages awarded herein, measured from February 12, 2013, through the date of entry of this order at the rate of 5% per annum.

4. Plaintiff is entitled to recover its reasonable and necessary attorney's fees for the prosecution of this case. The Court finds that Plaintiff is entitled to recover the amount of $9,500.00 which is reasonable and necessary for this case. It is further ORDERED, ADJUDGED, AND DECREED that in the event this matter is appealed to the court of appeals and Plaintiff prevails at the appellate level, Plaintiff shall be awarded $7,500.00 in reasonable and necessary attorney's fees. It is further ORDERED, ADJUDGED, AND DECREED that in the event a Writ of Error is

filed with the Texas Supreme Court and Plaintiff prevails at that stage, Plaintiff shall be awarded $7,500.00 in reasonable and necessary attorney's fees. It is further ORDERED, ADJUDGED, AND DECREED that in the event a Writ of Error is granted by Texas Supreme Court and Plaintiff prevails at that stage, Plaintiff shall be awarded $7,500.00 in reasonable and necessary attorney's fees.

5. Plaintiff is entitled to post-judgment interest on the total amount of the judgment and any prejudgment interest awarded hereinabove, at the rate of 5% per annum from the date this judgment is signed until paid.

6. It is further ORDERED, ADJUDGED, AND DECREED that Judgement here rendered shall include all taxable Court costs expended or incurred by Plaintiff in this cause which are hereby adjudged against Defendant, Tara Menon.

IT IS FURTHER ORDERED that Plaintiff, Water Splash, Inc., is entitled to enforce this judgment through abstract, execution and any other process necessary.

Furthermore, having analyzed the law and considered the evidence and testimony of witnesses, and the argument of counsel, the Court finds that there exist grounds upon which a Permanent Injunction should be issued against Menon.

Based upon Menon's conduct in the past and continued conduct relating to the use and alteration of Water Splash's proprietary information, Defendant, Tara Menon, her current or former agents, servants, employees, subcontractors and any entity owned by Defendant Menon or subject to her control are

PERMANENTLY ENJOINED and PROHIBITED from:

1. Using Water Splash's trade name or logo without its express permission;
2. Using Water Splash's plans, drawings, designs, marketing materials, specifications, renderings, product photos, CAD drawings, and/or any other materials created or owned by Water Splash without its express permission (including the use of such materials with or without redaction of any reference to Water Splash);
3. Intentionally soliciting business of Water Splash customers based upon any customer lists obtained from Water Splash through unauthorized means;
4. Representing that any plans, drawings, designs, marketing materials, specifications, renderings, product photos, CAD drawings, and/or any other materials created by or owned by Water Splash used in conjunction with submitting bids on projects (City of Galveston or otherwise) are those of Menon, if they originated from Water Splash;
5. Use of any products, drawings, scientific materials or technical data belonging to Water Splash or bearing the Water Splash name that have been altered, modified, or changed to appear as if they are not belonging to Water Splash;
6. Use of any design, technical, scientific or other related materials belonging to Water Splash to have third party suppliers build a product based upon a Water Splash design;

7. Conducting any business using products named "Water Jet #1", "Water Hoop", "Bubbler", "Fan Tail", "Wispy Misty", or any modifications to said products. Menon is also prohibited from changing the names of these products to avoid the mandates of this Injunction.

8. Engaging in the business of sales, installation, design or distribution of splash pads in connection with Mike Tello, South Pool and Spa, or any business or entity in which Mike Tello or South Pool and Spa have any direct or indirect ownership or profit interest.

Any and all other relief not expressly granted herein is DENIED.

SIGNED this 17 day of Sept, 2013.

/s/ [Illegible]
Judge Presiding

IN THE DISTRICT COURT OF
GALVESTON COUNTY, TEXAS
212th JUDICIAL DISTRICT

[Filed Jan. 3, 2014]

No. 13-CV-0205

WATER SPLASH, INC.

vs.

TARA MENON and SOUTH POOL and SPA, INC.

ORDER ON PLAINTIFFS' MOTION TO DISMISS, *WITH PREJUDICE,* AS TO SOUTH POOL AND SPA, INC. AND MUHAMMAD TELLO, ONLY

BE IT REMEMBERED that on this day came on for consideration the Plaintiff's Motion to Dismiss *With Prejudice* as to SOUTH POOL AND SPA, INC. AND MUHAMMAD TELLO, only, filed by WATER SPLASH, INC. ("PLAINTIFF"). The Court after considering same is of the opinion the motion is well-taken and should be GRANTED. It is therefore,

ORDERED, ADJUDGED and DECREED that Plaintiff's *Motion to Dismiss With Prejudice as to South Pool and Spa, Inc. and Muhammad Tello, Only,* is GRANTED and that Plaintiffs claims against SOUTH POOL AND SPA, INC. AND MUHAMMAD TELLO are hereby DISMISSED WITH PREJUDICE, with costs of Court taxed against the party incurring same. It is further,

ORDERED, ADJUDGED and DECREED that the Court's Default Judgment entered against TARA MENON on September 17, 2013 is a Final Judgment.

Any and all other relief not specifically granted herein is DENIED.

SIGNED AND ENTERED ON THIS 3rd DAY OF January, 2014.

/s/ [Illegible]
JUDGE ACTING

IN THE DISTRICT COURT OF
GALVESTON COUNTY, TEXAS
212TH JUDICIAL DISTRICT

[Filed Jan. 3, 2014]

Cause No. 13-CV-0205

WATER SPLASH, INC.

Plaintiff,

VS.

TARA MENON and SOUTH POOL and SPA, INC.

Defendants.

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

Came on this day to be heard Defendant's Motion for New Trial ("Motion"), and the Court, having considered the Motion, any response thereto, the evidence, the applicable legal authorities and the arguments, of counsel, is of the opinion that the Motion is meritorious and should be DENIED. It is, therefore,

ORDERED that Defendant's Motion for New Trial is DENIED.

SIGNED this 30th day of December 2013.

/s/ [Illegible]
JUDGE ACTING

Reversed and Remanded and Majority and Dissenting Opinions filed June 30, 2015.

[SEAL] THE STATE OF TEXAS
IN THE
FOURTEENTH COURT OF APPEALS

No. 14-14-00012-CV

TARA MENON,

Appellant

v.

WATER SPLASH, INC.,

Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause No. 13-CV-0205

OPINION

Appellant, Tara Menon ("Menon"), appeals the trial court's default judgment granted after she failed to answer the suit filed by appellee, Water Splash, Inc. ("Water Splash"). In four issues, Menon contends that the trial court erred in refusing to set aside the default judgment because state law cannot allow service of process in foreign nations where the service does not comport with the requirements of the Hague Service Convention. We reverse and remand.

I. BACKGROUND

Menon is a citizen of Canada, residing in Quebec. Water Splash is a Delaware corporation with its principal office located in Champlain, New York. Water Splash sued Menon in Galveston, Texas. In its original petition, Water Splash alleged that Menon was its regional sales representative and that Menon also began to act as a sales manager for South Pool, a competitor of Water Splash. Sometime in 2012, Water Splash discovered that South Pool had used some of Water Splash's designs and drawings when submitting a bid to the City of Galveston for the construction of splash pads at two parks. A year later, Water Splash sued South Pool and Menon for unfair competition, conversion, tortious interference with business relations, and conspiracy.

To effectuate service, Water Splash filed a motion for alternative service of process pursuant to Texas Rule of Civil Procedure 108a. *See* Tex. R. Civ. P. 108a. The motion requested that the trial court order service on Menon in Quebec, Canada, by "first class mail, certified mail, and Federal Express to Menon's address" and "by email to each of Menon's known email addresses." The trial court granted the motion.

After Menon did not file an answer or otherwise appear, Water Splash moved for default judgment alleging it had diligently sought service on Menon utilizing the methods allowed for substituted service. The motion stated that service was accomplished by sending a letter to Menon's Quebec address by certified mail, return receipt requested and first class mail, and Water Splash introduced evidence of those attempts at service. Water Splash also alleged that Menon's emails proved she knew of the existence of the suit. The trial court granted the motion for default

judgment against Menon and awarded actual and exemplary damages and attorneys' fees.

Menon filed a motion for new trial seeking to set aside the default judgment because service was not accomplished pursuant to the terms of article 10(a) of the Hague Service Convention. Water Splash responded, arguing Rule 108a was an acceptable form of alternative service. The trial court denied Menon's motion for new trial.

II. ANALYSIS

In four interrelated issues involving the interpretation of particular words in the Hague Service Convention, appellant attacks the trial court's grant of default judgment and denial of her motion for new trial.

A. Standard of Review

We review a trial court's denial of a motion for new trial for abuse of discretion. *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 925 (Tex. 2009). A trial court abuses its discretion if it reaches a decision without reference to any guiding rules or principles, or acts in an arbitrary or unreasonable manner. *Cire v. Cummings*, 134 S.W.3d 835, 838-39 (Tex. 2004); *Stevens v. Anatolian Shepherd Dog Club of Am., Inc.*, 231 S.W.3d 71, 76 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

Absent waiver, a trial court lacks personal jurisdiction over a defendant to whom citation has not been "issued and served in a manner provided for by law." *See Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990). In a direct appeal from a no-answer default judgment, there is no presumption of valid issuance, service, and return of citation. *See id.* (quoting *Uvalde Country Club v. Martin Linen Supply Co.*, 690 S.W.2d 884. 836

(Tex. 1985)) (per curiam). Thus, a default judgment cannot withstand a direct attack unless the record affirmatively shows strict compliance with the rules for service of citation. *Primate Constr., Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994) (per curiam). Whether a trial court has personal jurisdiction over a defendant is a question of law, which we review *de novo*. *Haaksman v. Diamond Offshore (Bermuda), Ltd.*, 260 S.W.3d 476, 479 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).

B. Hague Convention

Articles 2 through 7 of the Hague Convention require a signatory nation to establish a "Central Authority" which acts as an agent to handle various matters regarding requests for service, service of documents and proof of service. Article 10(a) of the Hague Convention, at issue here, states:

> Provided the State of designation does not object, the present Convention does not interfere with
>
> (a) the freedom to *send* judicial documents, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent person of the State of origin to effect *service* of judicial documents directly through the judicial officer, officials or other competent persons of the State of designation,
>
> (c) the freedom of any person interested in a judicial proceeding to effect *service* of judicial document directly through the judicial officers, officials, or other competent persons of the State of destination.

Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial

Matters, art. 10, No. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163, *available at* http:www.hcch.net/index_en.php?act=conventions.text&cid=17 (last visited June 22, 2015) ("Hague Convention"). The question before us turns on the meaning attributed to "send" and "service."

Where it applies, compliance with the provisions of the Hague Convention is "mandatory." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698-99 (1988). Its purpose is to provide a more efficient and effective manner of service of process abroad and to ensure that defendants sued in foreign jurisdictions receive timely notice of suit. *Id.*, at 699; *see also Nuovo Pignone, SpA v. STORMAN ASIA M/V*, 310 F.3d 374, 383 (5th Cir. 2002). In *Nuovo*, plaintiff attempted service by mailing service of process to the defendant's office in Italy. *See Nuovo*, 310 F.3d at 383. Arguing that service by mail violated Fed. R. Civ. P. 4(f)(1) because it did not comply with the Hague Convention, the defendant urged that the drafters used the term "send" in connection with the delivery of judicial documents, but used "serve," "service," and "to effect service" in other sections, including article 10. *Id.* The *Nuovo* court discussed how other courts have construed "send" and determined that, because "service" was used throughout the Hague Convention while "send" was confined solely to article 10(a), this demonstrated that the drafters did not "intend to give the same meaning to 'send' that they intended to give to 'service.'" *Id.* at 384. In short, the drafters intended to attach meaning to the specific word used. *See id.*

The Hague Convention applies "in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." 20 U.S.T. 361, art. 1. The Hague

Convention "preempts any inconsistent methods of service prescribed by Texas law in all cases where the Convention applies." *Wuxi Taihu Tractor Co, Ltd. v. York Group, Inc.*, No. 01-13-00016-CV, 2014 WL 6792019, at *5 (Tex. App.—Houston [1st Dist.] Dec. 4, 2014, no pet.) (mem. op.) (citing *Paradigm Entm't, Inc. v. Video Sys. Co.*, No. Civ. A. 3:99-CV2004P, 2000 WL 251731, at *4 (N.D. Tex. Mar. 3, 2000) (concluding service was effective where secretary of state forwarded a copy of service of process to defendant pursuant to Texas law, and Japan did not object to this manner of service).

C. Application of article 10(a)

Menon argues the default judgment should not have been rendered because she was not served with process. *See* Tex. R. Civ. P. 124 ("In no case shall judgment be rendered against any defendant unless upon service . . . ."). Menon further asserts that Water Splash did not effectuate service under Rule 108a, providing for service in a foreign country "pursuant to the terms of any treaty or convention," because she was not served pursuant to the Hague Convention service of process provisions. She argues "the drafters use the words 'serve,' 'service,' and 'to effect service' in other sections, including subparts (b) and (c) of article 10," but they only used the word "send" in subsection (a), which applies only to sending judicial documents. *See Nuovo*, 310 F.3d at 383.

Water Splash argues that article 10(a) allows service of process by mail, and relies on the "majority view" which holds that article 10(a) allows service of process by mail, so long as the state of destination does

not object.[1] Courts following this view include the Second, Fourth, Seventh and Ninth Circuits.[2]

We conclude that the better-reasoned approach is to follow the so-called "minority view" which adheres to and applies the meaning of the specific words used in article 10(a) and prohibits service of process by mail.

> 'Absent a clearly expressed legislative intention to the contrary,' a statute's language 'must ordinarily be regarded as conclusive.' *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct 2051, 64 L.Ed.2d 766 (1980). And because the drafters purposely elected to use forms of the word 'service' through the Hague Convention, while confining use of the word 'send' to article 10(a), we will not presume that the drafters intended to give the same meaning to 'send' that they intended to give to 'service.'

Nuovo, 310 F.3d at 384 (relying on canons of statutory interpretation and adopting the reasoning of the

---

[1] Canada has not objected to the use of the mail for service of process. *See* Canada—Central Authority & Practical Information, HAGUE CONF. OF PRIVATE INT'L. L., http://www.hcch.net/index_en.php?act=authorities.details&aid=248 (last updated Aug. 19, 2014) (listing the text of Canada's declarations, including those to "[t]ransmission through postal channels," and stating that "Canada does not object to service by postal channels" as permitted in article 10(a)); *see also Dierig v. Lees Leisure Indus., Ltd.*, CIV.A. 11-125-DLB, 2012 WL 669968, at *19 (E.D. Ky. Feb. 28, 2012) (mem. op.).

[2] *Ackermann v. Levine*, 788 F.2d 830, 838-39 (2nd Cir. 1986); *Koehler v. Dodwell*, 152 F.2d 304, 307-08 (4th Cir. 1998); *Research Sys. Corp. v. IPSOS Publicite*, 276 F.3d 914, 926 (7th Cir. 2002); and *Brockmeyer v. May*, 383 F.3d 798, 802 (9th Cir. 2004).

courts which concluded that article 10(a) of the Hague does not permit service of process by mail); *see also Bankson v. Toyota Motor Corp.*, 880 F.2d 172, 174 (8th Cir. 1989) (stating that language used should be regarded as conclusive and concluding that article 10(a) prohibits service of process by registered mail); *see also Wuxi Taihu Tractor*, 2014 WL 6792019, at *6 (citing *Nuovo*, 310 F.23d at 384). *Wuxi* involved service on a defendant located in China attempted under Rule 108a. *Id.* The *Wuxi* court held that article 5 of the Hague Convention does not permit service by direct mail to a defendant in China who should have been served through the Central Authority pursuant to the specific language of the Hague Convention. *Id.*

Because the purpose of the Hague Convention is to "ensure that plaintiffs deliver notice to foreign addressees in sufficient time to defend the allegation," we are not persuaded that the drafters did not intend what they wrote, particularly where the Hague Convention describes other methods of service. *See Nuovo*, 310 F.3d at 385. Specifically, articles 2 through 7 provide for service of process through a central authority and, under articles 8 and 9, through diplomatic channels. "It is unlikely that the drafters would have put in place these methods of service . . . while simultaneously permitting the uncertainties of service by mail." *Id.*

Further, other federal district courts in Texas which considered whether service of process by mail, under article 10(a) as involved here, or under article 5 which allows service through a central authority, have ruled consistently that service must be effectuated by the specific methods authorized by the terms included in the Hague Convention. *See Duarte v. Michelin N. Am., Inc.*, No. 2:13-CV-00050, 2013 WL 2289942, at *4–6

(S.D. Tex. 2013) (considering question of service by mail on the secretary of state and determining, following *Nuovo*, that service by mail not authorized under the Hague Convention) (citing *Berezowsky v. Ojeda*, No. 4:12-CV-03496, 2013 WL 150714, at *7 (S.D. Tex. 2013) (holding service was not effectuated under articles 2-5 which allows service of process under the Hague Convention through Mexico's Central Authority, demonstrating court's adherence to the specific meaning of the words used in the Hague Convention); *L.K. v. Mazda Motor Corp.*, No. 3:09-cv-469-M, 2009 WL 1033334, at *2 (N.D. Tex. 2009) (holding service under article 5 was not effective because Japanese requirement that service be transmitted to the Central Authority was not met); *Albo v. Suzuki Motor Corp.*, No. 3:08-0139-KC, 2008 WL 2783508, at *2 (W.D. Tex. 2008) (holding service not effective because, under article 5, the Hague Convention required full translation of documents into Japanese and without complying with specific Hague Convention requirements, service was insufficient).

Further, in addition to *Wuxi*, two other state courts have considered whether the specific words used in the Hague Convention have specific meanings regarding service of process or sending of judicial documents. *See In re J.P.L.*, 359 S.W.3d 695, 706 (Tex. App.—San Antonio, 2011, pet. denied) (holding that service of process in a child custody matter must be accomplished through the provisions of the Hague Convention and service on the Central Authority in Mexico); *Velasco v. Ayala*, 312 S.W. 3d 783, 794 (Tex. App.—Houston [1st Dist. 2009, no pet.) (relying on article 10(a) and *Nuovo* and concluding that service of process must be accomplished pursuant to the requirements of the Hague Convention).

In sum, we conclude the specific provisions set forth in the Hague Convention govern service, whether through article 5 and its reliance on a central authority, or on the language expressed in article 10(a).

For these reasons, we sustain appellant's four issues, reverse the trial court's default judgment and permanent injunction against Tara Menon, and remand for further proceedings consistent with this opinion.

/s/ John Donovan
Justice

Panel consists of Justices Christopher, Donovan, and Wise (Christopher, J., dissenting).

Reversed and Remanded and Majority and Dissenting Opinions filed June 30, 2015.

[SEAL] THE STATE OF TEXAS
IN THE
FOURTEENTH COURT OF APPEALS

No. 14-14-00012-CV

TARA MENON,

Appellant

v.

WATER SPLASH, INC.,

Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause No. 13-CV-0205

DISSENTING OPINION

The only question that appellant Tara Menon presents for our review is whether service by mail to a defendant in Canada is permitted under Article 10(a) of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("the Service Convention").[1] The majority concludes that it is not.[2] In reaching this

---

[1] *Opened for signature* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163.

[2] *But see Cook v. Toidze*, 950 F. Supp. 2d 386, 394 (D. Conn. 2013) ("[S]ervice by regular mail is proper under the Hague Convention where the party served is a resident of Canada.");

result, the majority fails to follow the United States Supreme Court's directions on the construction of treaties and the Texas Supreme Court's instructions on the correct approach to decisions of the federal courts. Because Texas intermediate appellate courts are bound by these authorities, I instead would follow their precepts, which lead to the conclusion that service by mail to a litigant in Canada is permitted under Article 10(a) of the Service Convention. I accordingly would affirm.

I. ISSUES PRESENTED

It is unnecessary to detail the facts in this case, because although Menon's brief lists four issues, she has presented only a single narrow question of law. That question is presented in her third issue, in which she asks, "Did the drafters of the Hague Service Convention intend for the word 'send' contained in Article 10(a) to mean 'serve'?" She restates the question in her fourth issue, asking, "May a litigant serve a Canadian citizen and resident of Québec with

---

Mitchell v. Theriault, 516 F. Supp. 2d 450, 455 (M.D. Pa. 2007) (holding that service of process by mail on a resident of Québec is not prohibited by the Service Convention); *Heredia v. Transp. S.A.S., Inc.*, 101 F. Supp. 2d 158, 161 (S.D.N.Y. 2000) ("[S]ervice by registered mail in Quebec is adequate service under the Convention."); *Randolph v. Hendry*, 50 F. Supp. 2d 572, 578 (S.D. W. Va. 1999) ("Because Canada does not object to service by postal channels, service of process by mail is authorized in this case."); *Taft v. Moreau*, 177 F.R.D. 201, 204 (D. Vt. 1997) ("Plaintiffs' use of registered mail, return receipt requested, to transmit the summons and complaint [to defendants in Québec] was in compliance with the Hague Convention."); *Cantara v. Peeler*, 701 N.Y.S.2d 556, 557 (App. Div. 1999) (holding that Article 10(a) permits service by mail upon residents of Canada because Canada has not objected to service through postal channels).

process in a Texas civil proceeding (bypassing traditional diplomatic channels and the Central Authority under the Hague Service Convention) by sending citation directly to the Canadian citizen . . . by mail, private delivery service, or e-mail?"

Menon's first two issues do not raise any other questions. Her briefing of her first stated issue ("Did the trial court err in denying the motion for new trial and refusing to set aside the default judgment?") contains no argument, but instead consists solely of an introduction and a single statement, with citations, regarding the standard of review.[3] In her second issue, she asks, "Can state law provide a procedure for service of process in foreign nations that does not comport with traditional international law (e.g. letters rogatory) or the Hague Service Convention?" As stated, this issue begs the question of whether service by mail comports with the Service Convention.

Menon has not briefed any other grounds for reversing the trial court's denial of her motion for new trial or setting aside the default judgment. Moreover, she concedes that "[i]f Article 10(a) authorizes service of process by a litigant mailing or e-mailing documents directly to a party, without going through the Central Authority of the receiving nation, then the service in this case was good." *See* TEX. R. CIV. P. 108a(1)(d) ("Service of process may be effected upon a party in a foreign country if service of the citation and petition is made . . . pursuant to the terms and provisions of any

---

[3] *See* Tex. R. APP. P. 38.1(i); *Archer v. DDK Holdings LLC*, No. 14-14-00017-CV, 2015 WL 1393299, at *4 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (where appellants stated an issue challenging the judgment and the trial court's findings on two grounds, but only briefed one ground, they waived appellate review of the unbriefed ground).

applicable treaty or convention . . . ."). But, before reaching this question, it is first necessary to clarify the standard of review.

II. STANDARD OF REVIEW

We review the trial court's ruling on a motion for new trial for abuse of discretion, but "abuse of discretion" means different things in different contexts. *See Schuring v. Fosters Mill Vill. Cmty. Ass'n*, 396 S.W.3d 73, 76 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). Here, the relevant facts are undisputed, and Menon moved for a new trial on the ground that Article 10(a) of the Service Convention does not permit service by mail. We accordingly are presented only with a question of law, not with a matter within the trial court's discretion. *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding) ("A trial court has no 'discretion' in determining what the law is or applying the law to the facts."). Courts review questions of law de novo. *Pinnacle Premier Props., Inc. v. Breton*, 447 S.W.3d 558, 563 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (sub. op.).

III. GOVERNING LAW

In this country, there are at least two competing lines of authority interpreting Article 10(a) of the Service Convention. The prevailing view holds that Article 10(a) permits service by mail. *See, e.g., Brockmeyer v. May*, 383 F.3d 798 (9th Cir. 2004); *Research Sys. Corp. v. IPSOS Publicité*, 276 F.3d 914 (7th Cir. 2002); *Koehler v. Dodwell*, 152 F.3d 304 (4th Cir. 1998); *Ackermann v. Levine*, 788 F.2d 830 (2d Cir. 1986). The countervailing view holds that Article 10(a) does not permit service by mail. *See, e.g., Nuovo Pignone, SpA v. STORMAN ASIA M/V*, 310 F.3d 374 (5th Cir. 2002); *Bankston v. Toyota Motor Corp.*, 889 F.2d 172

(8th Cir. 1989). This provision had not been construed previously by the United States Supreme Court, the Texas Supreme Court, or this court. In the absence of binding precedent for us to follow, this case presented our court with the opportunity to choose the better-reasoned approach. *See Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (per curiam) (explaining that Texas courts "are *obligated* to follow only higher Texas courts and the United States Supreme Court").

Fortunately, however, our existing tools are equal to the task of breaking new ground. Although there is no binding precedent that answers the specific question before us, there is binding precedent that tells us how to find that answer for ourselves. I accordingly would look first to the United States Supreme Court to identify the principles that both state and federal courts are required to apply in construing treaties. Next, I would follow the same steps used by our nation's highest court in applying those principles. *See Life Partners, Inc. v. Arnold*, Nos. 14-0122 & 14-0226, 2015 WL 2148767, at *7 (Tex. May 8, 2015) ("We have described the Supreme Court's decisions in some detail here, however, because in addition to providing the relevant test, they also describe the proper *approach* to the term's construction.").

A. Principles of Treaty Construction

In construing Article 10(a) of the Service Convention, this court is bound by the following principles.

1. A treaty is not legislation. *See Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1232-33, (2014) ("A treaty is in its nature a contract between . . . nations, not a legislative act.'" (quoting *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829))); *id.* at 1233 ("[I]n their nature

treaties originate differently from laws. They are made by equal parties, and each side has half of the bargain to make . . . ." (quoting 2 Debates on the Federal Constitution 506 (J. Elliot 2d ed. 1863) (James Wilson))).

2. A treaty is not construed in the same way as legislation. *See id.* at 1233 ("That distinction [between a legislative act and a contract] has been reflected in the way we interpret treaties."); *Nielsen v. Johnson*, 279 U.S. 47, 51 (1929) ("The narrow and restricted interpretation of the treaty . . . , while permissible and often necessary in construing two statutes of the same legislative body in order to give effect to both so far as is reasonably possible, is not consonant with the principles which are controlling in the interpretation of treaties.").

3. A treaty instead is construed in the manner of a contract. *See Lozano*, 134 S. Ct. at 1232-33; *see also BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1208 (2014) ("As a general matter, a treaty is a contract, though between nations. Its interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent."); *Santovincenzo v. Egan*, 284 U.S. 30, 40 & n.2 (1931) ("[T]reaties are contracts between independent nations . . . .").

4. A treaty, however, is construed more liberally than a private contract. *See Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431 (1943) ("[T]reaties are construed more liberally than private agreements . ."); *see also Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 10 (1936) ("[T]reaties should be liberally construed so as to give effect to the apparent intention of the parties."); *Factor v. Laubenheimer*, 290 U.S. 276, 293-94 (1933) (explaining that "[c]onsiderations which should govern the diplomatic relations

between nations, and the good faith of treaties" require that "if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred"); *Todok v. Union State Bank of Harvard, Neb.*, 281 U.S. 449, 454 (1930) (explaining that it is a "fundamental principle that treaties should receive a liberal interpretation to give effect to their apparent purpose").

5. Such a liberal construction is required to secure equality and reciprocity between the signatories. *See Factor*, 290 U.S. at 293 (explaining that treaties are "liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them"); *Jordan v. K Tashiro*, 278 U.S. 123, 127 (1928) (same); *see also Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 80 (Tex. 2000) ("As treaties are to be construed broadly, the treaty need not provide explicitly for equal court access; it need only imply it." (citing *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924)).

B. Steps in Applying the Principles of Treaty Construction

As the foregoing principles show, we are required to construe a treaty more liberally than a private contract to implement the apparent intention of the parties to secure equality and reciprocity between them. And although the construction of a treaty begins with its text, we are not permitted to end the inquiry there. *See, e.g., Abbott v. Abbott*, 560 U.S. 1, 9-10 (2010) ("This Court's inquiry is shaped by the text of the Convention; the views of the United States Department of State; decisions addressing the meaning of 'rights of custody' in courts of other contracting states; and the purposes of the Convention."); *Choctaw*

Nation, 318 U.S. at 431-32 ("[T]o ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." (citing *Factor*, 290 U.S. at 294, 295)).

As a practical matter, then, how do we apply the principles that govern treaty construction? To answer this question, I would again look to the precepts set forth by the United States Supreme Court. *See Life Partners, Inc.*, 2015 WL 2148767, at *7.

1. Identify the Treaty's Purpose.

The text must be read "with a view to making effective the purposes of the high contracting parties." *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921); *see also El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 169 (1999) (identifying a treaty's "cardinal purpose"). The treaty's purpose may be expressly stated in its preamble, *see Tseng*, 525 U.S. at 169, and the role played by a specific provision may be gleaned from the treaty's structure and the context in which the provision appears. *See Olympic Airways v. Husain*, 540 U.S. 644, 650 (2004) (noting that the Court considers the treaty's "text, structure, and history"); *Tseng*, 525 U.S. at 169 (identifying the treaty interpretation that "is most faithful to the Convention's text, purpose, and overall structure"); *Santovincenzo*, 284 U.S. at 37 (considering "the context of the provision in question").

2. Identify the signatories' shared expectations.

The treaty must be read "in a manner 'consistent with the shared expectations of the contracting parties.'" *Lozano*, 134 S. Ct. at 1233 (quoting *Husain*, 540 U.S. at 650); *Tseng*, 525 U.S. at 167 (same); *Air France v. Saks*, 470 U.S. 392, 399 (1985) ("[I]t is our responsibility to give the specific words of the treaty a meaning

consistent with the shared expectations of the contracting parties."); *see also Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 223-25 (1996) (rejecting the petitioners' interpretation of a phrase as "implausible" and "unlikely" in view of "the shared expectations of the contracting parties," and instead concluding that "an equally plausible reading . . . that leads to a more comprehensible result" was the only "realistic" alternative). Adherence to the parties' shared expectations is required because—unlike legislation—a treaty is "necessarily the product of consensus." Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1923 (2005). "Contrary to the majoritarian premise of statutory adoption, there is no means of imposing treaty obligations on a dissenting minority. If the product of negotiations is not satisfactory, a disaffected nation may simply not ratify the treaty." *Id.*

It therefore is no surprise that to identify those shared expectations, courts must consider the treaty's negotiating and drafting history. *See, e.g., Medellín v. Texas*, 552 U.S. 491, 507 (2008); *Tseng*, 525 U.S. at 167; *Zicherman*, 516 U.S. at 226; *Choctaw Nation*, 318 U.S. at 431-32; *Factor*, 290 U.S. at 294-95; *Nielsen*, 279 U.S. at 52. The construction of the Service Convention is no exception to this rule. *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988) (examining the Service Convention's drafting history and negotiations).

To understand a treaty's negotiating and drafting history, its provisions must be considered in the language used by the drafters in the official text. *See Zicherman*, 516 U.S. at 221 (considering the meaning of the French word *dommage* where the official text of

the treaty was in French, and rejecting the contention "that we simply look to English dictionary definitions of 'damage' and apply that term's 'plain meaning'"); *Saks*, 470 U.S. at 399 ("We look to the French legal meaning for guidance as to [the signatories' shared] expectations because the Warsaw Convention was drafted in French by continental jurists."); *Todok*, 281 U.S. at 454 ("The text of the treaty of 1783 with Sweden was in French only, and the French text is therefore controlling."). Where the official text of the treaty was drawn up in two languages, then courts consider both languages when analyzing the parties' shared expectations. *See United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833) (where a treaty was drawn up in both Spanish and English, the Court considered the text in both languages, explaining that "[n]o violence is done to the language of the treaty by a construction which conforms the English and Spanish to each other").

The Service Convention was drafted "in the English and French languages, both texts being equally authentic." *Schlunk*, 486 U.S. at 699; *see also* Service Convention, *supra* note 1, at closing paragraph (stating that the Service Convention was drafted "in the English and French languages, both texts being equally authentic, in a single copy"). Thus, the negotiating and drafting history of the Service Convention's text in both languages must be considered. *See Schlunk*, 486 U.S. at 700-01 (considering French terms that were proposed for inclusion in the Service Convention and comparing the meanings given to the terms "in some countries, such as France" and "in others, such as the United States"). This negotiating and drafting history may be documented by the conference's rapporteur. *See United States v. Louisiana*, 394 U.S. 11, 43 (1969).

In addition to considering the text itself, courts consider the way in which the text was interpreted by the delegates involved in negotiating and drafting the treaty. *See Schlunk*, 486 U.S. at 703 (considering statements and articles by Philip Amram, the head of the United States delegation to the Convention); *id.* at 709-10 & n.1, 714, 716 (Brennan, J., concurring) (same). The delegates' views also may be memorialized by the conference rapporteur. *See Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 530 n.13 (1987).

3. Accord "great weight" to the Executive Branch's interpretation.

"It is well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.'" *Abbott*, 560 U.S. at 15 (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982)); *Medellín*, 552 U.S. at 513 (same); *Tseng*, 525 U.S. at 168 ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty.").

4. Accord "considerable weight" to the interpretation of the other signatories.

Finally, the parties' shared expectations are shown by their post-ratification understanding and conduct. *See Medellín*, 552 U.S. at 507; *Husain*, 540 U.S. at 649-50; *Tseng*, 525 U.S. at 167; *Zicherman*, 516 U.S. at 227; *see also O'Connor v. United States*, 479 U.S. 27, 33 (1986) ("The course of conduct of parties to an international agreement, like the course of conduct of parties to any contract, is evidence of its meaning."). These may be documented in an organizational handbook or report. *See Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 182 n.40 (1993) (quoting Office of United Nations

High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status 46 (Geneva, Sept. 1979)). The United States Supreme Court instructs us that, when interpreting a treaty, "'[t]he opinions of our sister signatories . . . are entitled to considerable weight.'" *Abbott*, 560 U.S. at 16 *(Tseng*, 525 U.S. at 176); *Saks*, 470 U.S. at 404 (same).

5. Consider the analysis of scholars.

See Abbott, 560 U.S. at 18 ("Scholars agree that there is an emerging international consensus on the matter.").

IV. APPLICATION

Having identified the governing precepts in the construction of treaties and the way in which they are applied, I would pursue the same approach in this case.

A. The Service Convention's Purpose

The Service Convention's two purposes are stated in its preamble:

> The States signatory to the present Convention,
>
> Desiring to create appropriate means to ensure that judicial and extrajudicial documents *to be served abroad* shall be brought to the notice of the addressee in sufficient time,
>
> Desiring to improve the organisation of mutual judicial assistance *for that purpose* by simplifying and expediting the procedure,
>
> Have resolved to conclude a Convention to this effect and have agreed upon the following provisions

Service Convention, *supra* note 1, at preamble (emphasis added); *see also Schlunk*, 486 U.S. at 702-04 (looking to the Service Convention's preamble for the identification of its purpose). Consistent with those purposes, the Service Convention's scope is set forth in Article 1: "The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document *for service abroad*." Service Convention, *supra* note 1, at Art. 1 (emphasis added).

This is a more specific purpose than that found by the majority in this case. By agreeing with Menon's argument that "she was not served pursuant to the Hague Convention service of process provisions,"[4] the majority necessarily has concluded that there are *non-service* provisions in the Service Convention. But the United States Supreme Court has examined the English and French text of the Service Convention and its drafting history and concluded that the opposite is true: the Court explained that Article 1 "eliminate[d] the possibility" that the Service Convention could apply to transmissions abroad "that do not culminate in service":

> The preliminary draft of Article 1 said that the present Convention shall apply in all cases in which there are grounds *to transmit or to give formal notice of* a judicial or extra-judicial document in a civil or commercial matter to a person staying abroad. [3 1964 Conférence de la Haye de Droit International Privé, Actes et Documents de la Dixième Session (Notification) 65 (1965) (3 Actes et Documents)] ("La présente Convention est

---

[4] *Ante*, at ___.

> applicable dans tous les cas où il y a lieu *de transmettre ou de notifier* un acte judiciaire ou extrajudiciaire en matière civile ou commerciale à une personne se trouvant à l'étranger") (emphasis added). To be more precise, the delegates decided to add a form of the juridical term "signification" (service), which has a narrower meaning than "notification" in some countries, such as France, and the identical meaning in others, such as the United States. *Id.*, at 152-153, 155, 159, 366. The delegates also criticized the language of the preliminary draft because it suggested that the Convention could apply to transmissions abroad that do not culminate in service. *Id.*, at 165-167. The final text of Article 1, *supra*, eliminates this possibility and applies only to documents transmitted for service abroad. The final report (*Rapport Explicatif*) confirms that the Convention does not use more general terms, such as delivery or transmission, to define its scope because it applies only when there is both transmission of a document from the requesting state to the receiving state, and service upon the person for whom it is intended. *Id.*, at 366.

Schlunk, 486 U.S. at 700-01 (emphasis added).

In accordance with the United States Supreme Court's analysis, I would conclude that the Service Convention addresses only the transmission of documents that culminate in service, and thus, the reference in Article 10(a) to "send[ing] judicial documents" means "serv[ing] judicial documents." Service Convention, *supra* note 1, at Art. 10(a).

B. The Shared Expectations of the Signatories to the Service Convention

To ascertain the parties' shared expectations, I would consider the actual and proposed language of Service Convention's bilingual text, its negotiating and drafting history, and the understanding of the delegates.

1. Negotiating and Drafting History of the Text

In addition to the text and the negotiating and drafting history previously described, I would give considerable weight to the fact that "[t]he French text of the 1965 convention was copied from three earlier Hague Conference conventions, all of which were understood to allow service upon defendants abroad by mail." *See* Michael 0. Eshleman & Stephen A. Wolaver, *Using the Mail to Avoid the Hague Service Convention's Central Authorities*, 12 OR. REV. INT'L L. 283, 333 (2010).

I additionally would consider the following history:

> The Rapporteur's report on article 10(a) of the draft convention provides in part: "The provision of paragraph 1 [labelled '(a)' in the final text] also permits service by telegram if the state where service is to be made does not object. The Commission did not accept the proposal that postal channels be limited to registered mail."[5]

---

[5] Patricia N. McCausland, Note and Comment, *How May I Serve You? Service of Process by Mail Under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 12 PACE L. REV. 177, 186 n.67 (1992) (translated from 3 Actes et Documents de la

If Article 10(a) was considered to include service by telegram, and not to be "limited to registered mail," then it cannot be said, as the majority now holds, that this provision does not permit service by mail.

2. The Understanding of the Delegates

I next would consider the statements of Philip W. Amram, a member of the United States delegation to the Hague Conference that drafted the Service Convention. Indeed, in his concurring opinion in *Schlunk*, Justice Brennan identified Amram as "[t]he head of the delegation" and its "chief negotiator." *Schlunk*, 48 U.S. at 710, 714 (Brennan, J., concurring). Amram also was the only English-speaking member of the Service Convention's drafting committee. *See* Eshleman & Wolaver, *supra*, at 325 (citing Unification of the Rules of Private International Law: Report of the U.S. Delegation to the 10th Session of the Hague Conference on Private International Law, October 7-28, 1964, 52 Dep't State Bull. 265, 265-66 (1965)). Amram "told the Senate Foreign Relations Committee that 'unless the requested State objects, direct service by mail' was allowed under Article 10 and 'use of the central authority is not obligatory.'" *Id.* at 325-26 (footnotes omitted).

Because the United States Supreme Court cited Amram's statement to the Senate in the Court's only opinion construing the Service Convention, *see Schlunk*, 486 U.S. at 703, I would consider this statement in ascertaining the signatories' shared expectations. *See also* Philip W. Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A. J. 650, 653 (1965) ("Article 10 permits direct

---

Dixième Session (Conference de la Haye de Droit International Privé) 90 (1964)).

service by mail . . . unless [the receiving] state objects to such service.").

C. The Executive Branch's Interpretation of Article 10(a)

The Executive Branch has unwaveringly maintained that Article 10(a) permits service by mail. "Dean Rusk, the American secretary of state at the time the convention was negotiated, signed, and ratified, stated in his official report to President Johnson: 'Article 10 permits direct service by mail . . . unless [the receiving] state objects to such service.'" Eshleman & Wolaver, *supra*, at 325. The State Department subsequently produced a circular stating that unless a nation "'has made a specific reservation . . . objecting to service by registered mail . . . [service] may be made by international registered mail.'" *Id.* (citing U.S. Dep't of State, Bureau of Consular Affairs, Overseas Citizen Services, Office of Citizen Consular Services, Service of Legal Documents Abroad, *excerpted in* Judicial Assistance: Service: International Registered Mail, [2] 1981-1988 Digest § 6, at 1441-45). And, when the first federal appellate court held to the contrary, "the State Department formally said the . . . ruling was wrong . . . [in suggesting] that the Hague Convention does not permit as a method of service the sending of a copy of the summons and complaint by registered mail to a defendant in a foreign country.'" *Id.* at 326 (citing Letter from Alan J. Kreczco, Legal Adviser, U.S. Dep't of State, to the Administrative Office of the U.S. Courts and the National Center for State Courts (Mar. 14, 1991), *excerpted in United States Department of State Opinion Regarding the*

Bankston *Case and Service by Mail to Japan Under Hague Service Convention*, 30 I.L.M. 260, 261 (1991)).[6]

Regarding the specific application of Article 10(a) in this case, the State Department's website shows its view that Canada accepts "service of process by mail."[7]

In accordance with the instructions from the United States Supreme Court, I would give such views "great weight."

D. The Interpretation of Article 10(a) by Other Signatories

The post-ratification understanding of the parties can be seen in a Hague Conference report on the signatories' response to the following question:

> Question D: Have there been any court decisions in your country interpreting Article 10(a) of the Hague Service Convention which reads as follows:
>
> "Provided the State of destination does not object, the present Convention shall not interfere with –
>
> (a) the freedom to send judicial documents by postal channels directly to persons abroad . . ."
>
> [Answer] It was pointed out that the postal channel for service constitutes a method

---

[6] Kreczco's name actually is spelled "Kreczko"; his title was Deputy Legal Adviser; and the referenced letter was dated Mar. 14, 1990.

[7] U.S. Dep't of State, Bureau of Consular Affairs, *Legal Considerations: International Judicial Assistance: Country Information: Canada*, TRAVEL.STATE.GOV, http://travel.state.gov/content/travel/english/legal-considerations/judicial/country/canada.html (last visited June 26, 2015) (parentheses added).

> which is quite separate from service via the Central Authorities or between judicial officers. Article 10(a) in effect offered a reservation to Contracting States to consider that service by mail was an infringement of their sovereignty. Thus, theoretical doubts about the legal nature of the procedure were unjustified. Nonetheless, certain courts in the United States of America in opinions cited in the "Checklist" had concluded that service of process abroad by mail was not permitted under the Convention.[8]

The significance of this unanimity in the interpretation of a convention that has now existed for fifty years and has been signed or ratified by sixty-eight countries cannot be overstated, because as our highest court has explained, the judiciary's "role is limited to giving effect to the intent of the Treaty parties. When the parties to a treaty . . . agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation." *Avagliano*, 457 U.S. at 184-85.

Despite a diligent search, I have found no authority that our fellow signatories have interpreted Article 10(a) to pertain only to the "sending" of documents and not to the "service" of documents. Because the required

---

[8] PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, REPORT ON THE WORK OF THE SPECIAL COMMISSION OF APRIL 1989 ON THE OPERATION OF THE HAGUE CONVENTIONS OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS AND OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS 4-5 (Apr. 1989), *available at* http://www.hcch.net/upload/scrpt89e_20.pdf (italics omitted).

"extraordinarily strong contrary evidence" is lacking, I accordingly would defer to the signatories' interpretation that Article 10(a) permits service by mail. *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 259 (1984) ("We may not ignore the actual, reasonably harmonious practice adopted by the United States and other signatories in the first 40 years of the Convention's existence." (referring to the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in Note following 49 U.S.C. § 1502)); *see also In re Morgan Stanley & Co.*, 293 S.W.3d 182, 189-90 (Tex. 2009) (orig. proceeding) (rejecting the Fifth Circuit's interpretation on a question of law "[g]iven the overwhelming weight of authority" reaching a contrary result).

E. The Interpretation of Article 10(a) by Leading Scholars

I also would follow the example of the United States Supreme Court in consulting the writings of Bruno Ristau as to the intentions of the Service Convention's drafters. *See Schlunk*, 486 U.S. at 698, 700, 703 (citing 1 B. Ristau, International Judicial Assistance (Civil and Commercial) (1984 and 1 Supp. 1986)). Like all of our sister signatories and our own government, Ristau states that Article 10(a) permits service by mail:

> Ristau has written that the language of Article 10(a) regarding the use of "postal channels" was "intended to include service of process." Others concur. "It is clear that . . . every participant in the debates concerning Article 10(a) . . . understood the provision as referring to . . . the use of postal channels for the purpose of service." Another analysis said

> "[p]erhaps the most compelling evidence in support of the theory that Article 10(a) authorizes service by mail is the fact that those who actually participated in the original Convention . . . believe that to be the case."
>
> Ristau quoted the official report on the draft convention, which indicated the language of Article 10 was worded broadly. It is so broad, he writes, that it "permits service by telegram if the State where service is to be made does not object."

Eshleman & Wolaver, *supra*, at 331-32 (footnotes omitted).

Based on all of the foregoing, I would conclude that Article 10(a) of the Service Convention permits service by mail.

V. THE COUNTERVAILING VIEW

The majority concludes that "the better-reasoned approach" is to follow the countervailing view espoused by the Fifth Circuit in *Nuovo Pignone, SpA v. STORMAN ASIA M/V*, 310 F.3d 374 (5th Cir. 2002). The majority, however, has not explained why an approach that eschews the principles of treaty construction laid down by the United States Supreme Court is "better-reasoned," or even how those following the prevailing view have arrived at a different result.

The majority's opinion constitutes binding precedent on this court until it is overruled by a higher court or by our own court, whether in response to a motion for rehearing or for rehearing en banc or in a different case. And because it is binding, I believe it is important for the analysis to be transparent. This is especially so in this case, given that the majority

adopts an interpretation contrary to that of the American delegation, the American government, most American courts, and those of our sister signatories—including, as the majority admits, Canada.[9] I accordingly have applied the governing precepts to illustrate how they necessarily lead to the conclusion that Article 10(a) of the Service Convention permits service by mail. Respectfully, I believe that the majority's differing analysis, like the analyses in the cases on which it relies, is flawed.

A. The Majority's Adoption of the Reasoning of *Nuovo Pignone*

As previously explained, the first precept of treaty construction is that a treaty is not construed as legislation, but instead is construed more liberally than a private contract, drawing on a wide variety of sources in order to implement the signatories' shared expectations. In *Nuovo Pignone*, however, the Fifth Circuit did the opposite. As the court stated it,

---

[9] *Ante*, at ___, n.1; *see also* Hague Conference on Private Int'l Law, List of Central Authorities Designated by Canada, HCCH, 6, http://www.hcch.net/upload/authl4ca2014en.pdf (list up-to-date as of August 2014) (identifying the Ministère de la Justice as the Central Authority for Québec and identifying that office's website). On that website, Québec's Central Authority states, "The Convention also sets out other methods of transmitting documents that do not require processing through a Central Authority [including] postal service . . . . Under the Convention, a State may object to those methods although Canada did not declare any opposition when it ratified the Convention." Gouvernement du Québec, *Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters: Other Methods of Transmission*, JUSTICE QUÉBEC, http//www.justice.gouv.qc.ca/english/programmes/sneaje/transmission-a.htm (last updated Feb. 26, 2004).

> We adopt the reasoning of courts that have decided that the Hague Convention does not permit service by mail. In doing so, we rely on the canons of statutory interpretation rather than the fickle *presumption* that the drafters' use of the word "send" was a mere oversight. "Absent a clearly expressed legislative intention to the contrary," a statute's language "must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 64 L. Ed. 2d 766 (1980). And because the drafters purposely elected to use forms of the word "service" throughout the Hague Convention, while confining use of the word "send" to article 10(a), we will not *presume* that the drafters intended to give the same meaning to "send" that they intended to give to "service."

Id. at 384 (emphasis added). Thus, the Fifth Circuit essentially compared two words—in English only—and treated the distinction between the two as conclusive. *But see* Eshleman & Wolaver, *supra*, at 333-34 (discussing use of the same language in the Conventions of 1954, 1905, and 1896, all of which used the French word translated as "send" in referring to service of process by mail).

This approach follows none of the governing precepts of treaty construction. The majority in this case, like the authors of the cases on which the majority relies, instead have followed a canon of statutory interpretation, despite the United States Supreme Court's contrary directive in a case decided just last year. *See Lozano*, 134 S. Ct. at 1232-33 ("The Hague Convention . . . is a treaty, not a federal

statute. . . . 'A treaty is in its nature a contract between . . . nations, not a legislative act.' . . . That distinction has been reflected in the way we interpret treaties. It is our 'responsibility to read the treaty in a manner consistent with the *shared* expectations of the contracting parties.") (citations and internal quotations omitted, emphasis in original). The majority in this case neither treats the United States Supreme Court's discussion of how a Hague Convention is to be construed as binding precedent, nor explains its reasons for failing to do so. The majority instead follows *Nuovo Pignone*, in which the Fifth Circuit approached the question of treaty construction as though the only alternative to the application of "canons of statutory construction" was a "fickle presumption that the drafters' use of the word "send" was a mere oversight." *Nuovo Pignone*, 310 F.3d at 384. But, the drafters' intent is well-established without the need for a presumption. As previously explained, there is no dispute among the signatories that Article 10(a) permits service by mail. Like the majority in this case, the *Nuovo Pignone* court did not even mention most of the precepts that govern treaty construction, or the fact that the Service Convention's predecessors dating back more than a hundred years used the word "send" even when referring to service of process by mail.

As reasons for rejecting the interpretation of Article 10(a) that is followed by all of the other Service Convention's signatories, the United States government, and a majority of courts in this country, the Fifth Circuit stated as follows:

> Nuovo Pignone's contention that the broad purpose of the Hague Convention is furthered if article 10(a) is interpreted to allow service

by mail is problematic. As noted, the purpose of the Hague Convention is not only to simplify the service of process, but to ensure that plaintiffs deliver notice to foreign addressees in sufficient time to defend the allegation. Indeed, FED. R. CIV. P. 4(f)(1) presumes that the Hague Convention provides methods of service "reasonably calculated to give notice."

We are not confident, nor should the drafters have been confident in 1967 [sic],[10] that mail service in the more than forty signatories [sic][11] is sufficient to ensure this goal. [In an accompanying footnote, the court added, "Indeed, the advisory committee notes to the 1963 amendments to FED. R. CIV. P. 4 recognize that '[s]ervice of process beyond the territorial limits of the United States may involve difficulties not encountered in the case of domestic service.'"] Under Nuovo Pignone's interpretation of article 10(a), the fact that a signatory could object to service by mail is unconvincing. There is no reason to think that signatories with inadequate mail

---

[10] The Convention was not drafted in 1967; it was drafted in 1964. *See Schlunk*, 486 U.S. at 698 ("The Hague Service Convention is a multilateral treaty that was formulated in 1964 by the Tenth Session of the Hague Conference of Private International Law.").

[11] There were twenty-three member States when the Service Convention was drafted. *See Schlunk*, 486 U.S. at 698 ("Representatives of all 23 countries that were members of the Conference approved the Convention without reservation."); Kurt H. Nadelmann & Willis L. M. Reese, *The Tenth Session of the Hague Conference on Private International Law*, 13 AM. J. COMP. L. 612, 612 n.1 (1964) (listing the twenty-three member States when the Service Convention was drafted).

> services would voluntarily opt out of article 10(a).
>
> Finally, we note that other provisions of the Hague Convention describe more reliable methods of effecting service. Service of process through a central authority under articles 2 through 7 and service through diplomatic channels under articles 8 and 9 require that service be effected through official government channels. It is unlikely that the drafters would have put in place these methods of service requiring the direct participation of government officials, while simultaneously permitting the uncertainties of service by mail.

Id. at 384-85 & n.17. For several reasons, the stated rationale cannot withstand scrutiny.

First, the Fifth Circuit implies that in the Federal Rules of Civil Procedure in effect when the Service Convention was drafted, the advisory committee anticipated that service abroad *by mail* involved difficulties not present in domestic service. To the contrary, however, the advisory committee's only example of difficulties in service abroad was that "a person not qualified to serve process according to the law of the foreign country may find himself subject to sanctions if he attempts service therein."[12] The 1963 amendment to Federal Rule of Civil Procedure 4(i) was intended

---

[12] *See* ADVISORY COMM. ON CIVIL RULES, STATEMENT ON BEHALF OF THE ADVISORY COMMITTEE ON CIVIL RULES, PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 11 (July 18, 1962), *available at* http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-july-1962.

to ameliorate such difficulties by providing for five "alternative provisions for service in a foreign country"—including service by mail. *See Amendments to Rules of Civil Procedure for the U.S. Dist. Courts*, 31 F.R.D. 587, 595 (1963). That provision, "permitting service by certain types of mail, affords a manner of service that is inexpensive and expeditious, and requires a minimum of activity within the foreign country."[13] The Fifth Circuit cites neither evidence nor authority for its contrary assumption.

Second, the court's statement that "[t]here is no reason to think that signatories with inadequate mail services would voluntarily opt out of article 10(a)" is contrary to the statutory textual analysis that the authoring court purports to apply. Specifically, Article 21 of the Service Convention *requires* that "[e]ach Contracting State shall similarly inform the Ministry, where appropriate, of . . . opposition to the use of methods of transmission pursuant to Articles 8 and 10." Service Convention, *supra* note 1, at Art. 21; *see also United States v. Caldera-Herrera*, 930 F.2d 409, 411 (5th Cir. 1991) ("Where possible, statutes must be read in harmony with one another so as to give meaning to each provision." (citing *Fed. Aviation Admin. v. Robertson*, 422 U.S. 255, 261 (1975))). Not only must we presume that signatories that voluntarily chose to sign the agreement intended to comply with Article 21, but such compliance is objectively verifiable by the signatories' post-ratification conduct:

---

[13] ADVISORY COMM. ON CIVIL RULES, *supra* note 12, at 12.

approximately half of the Service Convention's signatories have either qualified their acceptance of Article 10 or have opposed it entirely.[14]

Third, the Fifth Circuit makes the unsupported assumption that the drafters would not have permitted service by mail when two "more reliable" methods of service (through a Central Authority and through diplomatic channels) were available. In doing so, the court assumes not only that mail is less reliable, but also that the drafters would not have included both a more reliable and a less reliable method. If this were true, however, then the drafters would have included only the single most reliable method of service, whether that was service through a Central Authority or service through diplomatic channels, but not both. *But see* Philip W. Amram, *Report on the Tenth Session of the Hague Conference on Private International Law*, 59 AM. J. INT'L L. 87, 90 (1965) ("Use of the Central Authority is purely optional with the applicant for service."). And if mail is presumed unreliable, then how are the service documents to be transmitted to a foreign Central Authority *without* the use of mail? *See* Service Convention, *supra* note 1, at Art. 2 ("Each Contracting State shall designate a Central Authority which will undertake to *receive requests for service coming from other Contracting States . . . .)* (emphasis added); *id.* at Art. 3 ("The authority or judicial officer competent under the law of the State in which the documents originate *shall forward to the Central Authority* of the State addressed a request conforming to the model annexed to the present Convention . . . .")

---

[14] *See* Hague Conference on Private Int'l Law, *Table Reflecting Applicability of Articles 8(2), 10(a), (b), and (c), 15(2) and 16(3) of the Hague Service Convention*, HCCH (Feb. 2013), http://www.hcch.net/upload/applicability14e.pdf.

(emphasis added). And how, without using mail, is the foreign Central Authority to communicate directly with the applicant as required? *See id.* at Art. 4 ("If the Central Authority considers that the request does not comply with the provisions of the present Convention *it shall promptly inform the applicant* and specify its objections to the request.") (emphasis added); *id.* at Art. 6 ("The Central Authority of the State addressed . . . shall complete a certificate . . . [stating] that the document has been served . . . [or stating] the reasons which have prevented service. The certificate *shall be forwarded directly to the applicant.*") (emphasis added).

Because the Fifth Circuit in *Nuovo Pignone* did not apply the correct precepts of treaty construction but instead relied on unsupported assumptions, I would decline to follow it. The majority states that "other federal district courts in Texas . . . have ruled consistently that service must be effectuated by the specific methods authorized by the terms included in the Hague Convention."[15] But, *all* courts agree that if the Hague Service Convention applies, then service must be effectuated by a means permitted under the treaty's terms. As phrased, this statement begs the question of whether service by mail is permitted under Article 10(a). If the majority intended to suggest that federal district courts in the Fifth Circuit have consistently stated that Article 10(a) does not permit service by mail, then that implication is wrong. *See, e.g., Chattem Chems., Inc. v. Akzo Nobel Chems. B. V.*, 229 F. Supp. 2d 555, 556 (M.D. La. 2002) ("The Court, having reviewed conflicting authorities, finds that service

---

[15] *Ante*, at ___.

made pursuant to Article 10(a) comports with the purpose, meaning and intent of the Hague Convention."); *Brown v. Bandai Am., Inc.*, No. 3-01-CV-0442-R, 2002 WL 1285265, at *4 (N.D. Tex. June 4, 2002) ("[T]he Court determines that service of process by mail is permissible under Article 10(a) of the Hague Convention."); *Lafarge Corp. v. M/V MACEDONIA HELLAS*, No. Civ.A. 99-2648, 2000 WL 687708, at *11 (E.D. La. May 24, 2000) ("[T]his court adopts the reasoning of those courts that conclude that the Hague Convention permits service of process by mail pursuant to Article 10(a)."); *Friede & Goldman, Ltd. v. Gotaverken Arendal Consultants*, No. CIV A 99-1970, 2000 WL 288375, at *3 (E.D. La. Mar. 16, 2000) ("[T]his Court adopts the reasoning of those courts that conclude that the Hague Convention permits service of process by mail pursuant to Article 10(a)."); *Paradigm Entm't, Inc. v. Video Sys. Co.*, No. Civ.A. 3:99-CV-2004P, 2000 WL 251731, at *7 (N.D. Tex. Mar. 3, 2000) ("[T]his Court finds that Article 10(a) provides for service by mail in the current situation."); *Ortega Dominguez v. Pyrgia Shipping Corp.*, No. Civ.A. 98-529, 1998 WL 204798, at *2 (E.D. La. Apr. 24, 1998) ("[T]his Court finds that Article 10(a) of the Hague Convention permits service of process by mail."); *Smith v. Dainichi Kinzoku Kogyo Co.*, 680 F. Supp. 847, 851 (W.D. Tex. 1988) ("Plaintiffs' service of process directly upon Dainichi–Japan by registered mail was sufficient to comport with Art. 10(a) of the Hague Convention."); *Great Am. Boat Co. v. Alsthom Atl., Inc.*, Civ. A. Nos. 84-0105 & 84-5442, 1987 WL 4766, at *3 (E.D. La. Apr. 8, 1987) ("Mailing a summons and a copy of the complaint with a return receipt . . . creates personal jurisdiction . . . against a FSIA corporation [i.e, a corporation whose ownership

is vested in a foreign state] . . . in a Hague Service Convention state . . . .").

The majority cites several opinions that were issued by federal district courts in Texas after the Fifth Circuit Court of Appeals decided *Nuovo Pignone*, but these decisions add nothing to the discussion. The authoring courts had no choice but to follow *Nuovo Pignone*, because the opinion constitutes binding precedent over the lower courts in the Fifth Circuit. The distinction between a court that is merely following precedent and one that makes an independent determination of an issue can hardly be overemphasized: the Fifth Circuit's trial courts are *required* to treat the Fifth Circuit Court of Appeals' decisions as binding precedent, whereas Texas state courts—including this one—are *forbidden* to treat them as binding precedent. As the Texas Supreme Court has explained:

> The court of appeals' discussion of [a Fifth Circuit case] and its cursory dismissal of contrary federal precedent from other jurisdictions suggests that the court felt bound by the pronouncements of the Fifth Circuit on federal law issues. This is not the case. . . . By focusing so exclusively on [the Fifth Circuit case], the court of appeals overlooks the . . . the weight of . . . federal court decisions from other jurisdictions.

Penrod Drilling Corp., 868 S.W.2d at 296. The majority's failure to discuss the governing precepts of treaty construction or to address the reasoning of courts that have reached a conclusion contrary to that of the Fifth

Circuit suggests that the majority has fallen into the same error here.[16]

B. The Majority's Reliance on State Court Decisions

The majority's treatment of state court decisions appears to me to be similarly flawed. For example, the majority cites *Wuxi Taihu Tractor Co. v. York Group*,

---

[16] This is not the only problem with the majority's discussion of federal district court decisions. The only case that it cites for the proposition that the Service Convention does not permit service by mail is *Duarte v. Michelin North America, Inc.*, No. 2:13—CV—00050, 2013 WL 2289942 (S.D. Tex. May 23, 2013). The majority cites the remaining cases only in connection with articles of the Service Convention that are not at issue here. And although *Duarte* does indeed cite *Berezowsky v. Ojeda*, No. 4:12-CV-03496, 2013 WL 150714 (S.D. Tex. Jan. 14, 2013) that opinion has since been vacated. 765 F.3d 456 (5th Cir. 2014).

The majority cites *L.K. v. Mazda Motor Corp.*, No. 3:09-cv-469-M, 2009 WL 1033334, at *2 (N.D. Tex. Apr. 15, 2009) with the parenthetical, "holding service under article 5 was not effective because Japanese requirement that service be transmitted to the Central Authority was not met." That is not the case's holding. To the contrary, the authoring court did not analyze the adequacy of service at all, but said only that "Plaintiffs' counsel admits that he failed to comply with the requirements of the Hague Convention,"

Finally, the majority cites *Albo v. Suzuki Motor Corp.*, No. 3:08-0139-KC, 2008 WL 2783508 (W.D. Tex. July 2, 2008) with the parenthetical, "holding service not effective because, under article 5, the Hague [Service Convention] required full translation of documents into Japanese and without complying with specific Hague [Service Convention] requirements, service was insufficient." But as the authoring court explains, the Service Convention itself has no such requirement; it simply provides that "'the Central Authority *may* require [the] document be written in, or translated into, the official language or one of the official languages of the State.'" *Id.* at *2 n.2 (quoting Service Convention, *supra* note 1, at Art. 5) (emphasis added).

Inc., stating that the authoring court "held that article 5 of the Hague Convention does not permit service by direct mail to a defendant in China who should have been served through the Central Authority pursuant to the specific language of the Hague Convention."[17] If that were the court's holding, then the case would be merely inapposite, because only Article 10(a) is at issue in this case. But that was not the court's holding, as can be seen from the fact that the *Wuxi Taihu* court *affirmed* the post-answer default against the foreign defendant. No. 01-13-00016-CV, 2014 WL 6792019, at *1 (Tex. App.—Houston [1st Dist.] Dec. 2, 2014, pet. pending) (mem. op.). In describing this as the court's holding, the majority fails to follow the standard for distinguishing between dicta and an alternative holding. *See State Farm Mut. Auto. Ins. Co. v. Lopez*, 156 S.W.3d 550, 554 (Tex. 2004) (op. on reh'g) (granting petitioner's motion for rehearing because "we failed to apply the standard for distinguishing between alternative holdings and dicta"); *Tex. Natural Res. Conservation Comm'n v. White*, 46 S.W.3d 864, 868 (Tex. 2001) (explaining that a court's statement is not dicta but instead is an alternative holding if "the court could have relied on either determination to reach its ultimate conclusion"). Moreover, the construction of Article 10(a)—the only issue presented for our review—is never mentioned in *Wuxi Taihu*. Indeed, the issue could not have arisen on the facts in that case, because the defective-service complaint in *Wuxi Taihu* concerned service in the People's Republic of China,[18] which—in accordance with Article 21 of the Service Convention—has formally declared its opposition to "the service of documents in the territory

---

[17] *Ante*, at ___.

[18] *See Wuxi Taihu*, 2014 WL 6792019, at *1.

of the People's Republic of China by the methods provided by Article 10 of the Convention."[19] But what the *Wuxi Taihu* court actually held was that, regardless of the appellant's claims of defective service, the appellant nevertheless "chose to answer, and it cannot now, after voluntarily appearing, avoid the consequences of its choice." *See Wuxi Taihu*, 2014 WL 6792019, at *10 n.6 (citing *Onda Enters., Inc. v. Pierce*, 750 S.W.2d 812, 813 (Tex. App.—Tyler 1988, orig. proceeding) (per curiam)). As a result, the entirety of the *Wuxi Taihu* court's discussion of the Service Convention is dicta.

The other Texas cases cited by the majority and decided by our sister courts also do not concern Article 10(a). *See In re J.P.L.*, 359 S.W.3d 695 (Tex. App.—San Antonio 2011, orig. proceeding [mand. denied]); *Velasco v. Ayala*, 312 S.W.3d 783 (Tex. App.—Houston [1st Dist.] 2009, no pet.).[20] As in *Wuxi Taihu*, the issue in *Velasco* and in *J.P.L.* concerned service of process in a country that has made a formal declaration of opposition to Article 10. Specifically, both *Velasco* and *J.P.L.* concerned service in Mexico.[21] Like the *Wuxi Taihu* opinion, the *Velasco* opinion cites Article 5 as authority for the proposition that service by mail does

---

[19] A courtesy translation of that country's declarations are available on the website of the Hague Conference on Private International Law at http://www.hcch.net/index_en.php?act=status.comment&csid=393&disp=resdn (last visited June 26, 2015).

[20] *See ante*, at ___.

[21] A courtesy translation of Mexico's "declarations made at the moment of accession" is available on the website of the Hague Conference on Private International Law at http://www.hcch.net/index_en.php?act=status.comment&csid=412&disp=resdn (last visited June 26, 2015).

not comply with the Service Convention. *See Velasco*, 312 S.W.3d at 794. In *J.P.L.*, the authoring court interpreted Article 19 of the Service Convention. *See J.P.L.*, 359 S.W.3d at 707. Thus, in none of the Texas state decisions cited by the majority was the question of the correct interpretation of Article 10 even before the court. These cases accordingly add nothing to the majority's analysis—which make its failure to address the reasoning of the cases that actually do address that question and follow the prevailing view and all the more puzzling.

VI. CONCLUSION

For the reasons stated herein, I would conclude that Article 10(a) of the Service Convention permits service by mail in Canada. Because the majority does not, I respectfully dissent.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, Donovan, and Wise (Donovan, J., majority).

[SEAL] THE STATE OF TEXAS
THE FOURTEENTH COURT OF APPEALS

[Filed: June 30, 2015]

No. 14-14-00012-CV

TARA MENON,

Appellant,

v.

WATER SPLASH, INC.,

Appellee.

JUDGMENT

This cause, an appeal from the judgment in favor of appellee, Water Splash, Inc., signed September 17, 2013, was heard on the transcript of the record. We have inspected the record and find error in the judgment. We therefore order the judgment of the court below REVERSED and REMAND the cause for proceedings in accordance with the court's opinion.

We further order that all costs incurred by reason of this appeal be paid by appellee, Water Splash, Inc.

We further order this decision certified below for observance.

[SEAL] FOURTEENTH COURT OF APPEALS
301 Fannin, Suite 245
Houston, Texas 77002

Tuesday, October 06, 2015

RE: Case No. 14-14-00012-CV

Style: Tara Menon v. Water Splash, Inc.

Please be advised that on this date the court DENIED APPELLEE'S motion for rehearing en banc in the above cause.

T. C. Case # 13-CV-0205 Christopher Prine, Clerk

Jeremy Jason Gaston
Hawash Meade Gaston Neese & Cicack, LLP
2118 Smith Street
Houston, TX 77002
DELIVERED VIA E-MAIL

[SEAL] FOURTEENTH COURT OF APPEALS
301 Fannin, Suite 245
Houston, Texas 77002

Tuesday, October 06, 2015

RE: Case No. 14-14-00012-CV

Style: Tara Menon v. Water Splash, Inc.

Please be advised that on this date the court DENIED APPELLEE'S motion for rehearing en banc in the above cause.

T. C. Case # 13-CV-0205 Christopher Prine, Clerk

Andrew K. Meade
Meade, Hawash, Gaton, Neese & Cicack, LLP
2118 Smith Street
Houston, TX 77002
DELIVERED VIA E-MAIL

[SEAL] FOURTEENTH COURT OF APPEALS
301 Fannin, Suite 245
Houston, Texas 77002

Tuesday, October 06, 2015

RE: Case No. 14-14-00012-CV

Style: Tara Menon v. Water Splash, Inc.

Please be advised that on this date the court DENIED APPELLEE'S motion for rehearing en banc in the above cause.

T. C. Case # 13-CV-0205 Christopher Prine, Clerk

Timothy A. Hootman
2402 Pease Street
Houston, TX 77003
DELIVERED VIA E-MAIL

SUPREME COURT OF TEXAS

RE: Case No. 15-0901 DATE: 5/27/2016

COA #: 14-14-00012-CV TC#: 13-CV-0205

STYLE: WATER SPLASH INC. v. MENON

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

MR. TIMOTHY ANDREW HOOTMAN
ATTORNEY AT LAW
2402 PEASE STREET
HOUSTON, TX 77003-5238

* DELIVERED VIA E-MAIL *

RE: Case No. 15-0901 DATE: 5/27/2016

COA #: 14-14-00012-CV TC#: 13-CV-0205

STYLE: WATER SPLASH INC. v. MENON

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

MR. CHRISTOPHER A. PRINE
CLERK, FOURTEENTH COURT OF APPEALS
HARRIS COUNTY 1910
COURTHOUSE
301 FANNIN SUITE 245
HOUSTON, TX 77002

* DELIVERED VIA E-MAIL *

RE: Case No. 15-0901 DATE: 5/27/2016

COA #: 14-14-00012-CV TC#: 13-CV-0205

STYLE: WATER SPLASH INC. v. MENON

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

MR. JEREMY J. GASTON
HAWASH MEADE GASTON NEESE & CICACK LLP
2118 SMITH STREET
HOUSTON, TX 77002

* DELIVERED VIA E-MAIL *

RE: Case No. 15-0901 DATE: 5/27/2016

COA #: 14-14-00012-CV TC#: 13-CV-0205

STYLE: WATER SPLASH INC. v. MENON

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

MR. JOHN KINARD
GALVESTON COUNTY COURTHOUSE
600 59TH ST., RM. 4001
GALVESTON, TX 77551

* DELIVERED VIA E-MAIL *